(21,234.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 182.

HUTCHINSON, PIERCE & CO., APPELLANT,

vs.

JOSEPH LOEWY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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3189.

United States Circuit Court of Appeals for the Second Circuit.

HUTCHINSON, PIERCE & COMPANY, Complainants-Appellants,
vs.
JOSEPH LOEWY, Defendant-Appellee.

TRANSCRIPT OF RECORD.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Printed under the direction of the clerk.

1 *Bill of Complaint.*

(Filed May 14, 1906.)

Circuit Court of the United States for the Southern District of New York. In Equity.

To the Honorable the Judges of the Circuit Court of the United States for the Southern District of New York, Sitting as a Court of Equity:

Hutchinson, Pierce & Co., a corporation organized and existing under and by virtue of the laws of the State of New York and having its principal place of business in the City of New York, in said State, brings this its bill of complaint against Joseph Loewy, of the City of New York, in the State of New York, an inhabitant of the Southern District of New York, carrying on business under the name J. Loewy & Co., in said City of New York, and hereinafter designated the Defendant.

And thereupon your orator complains and says that it is engaged in the business of manufacturing and selling shirts, waists, underwear and furnishings and that its said business was founded in or about the year 1840, and that from the year 1840 to the present time it has been a continuing business and is now a business of large proportions which has long been and continues to be a source of profit to those conducting it and of benefit and advantage to the public.

Your orator says that its said business of manufacturing
2 and selling shirts, waists, underwear and furnishings now by it carried on has been a continuous business, owned, conducted and carried on successively by T. A. Morison & Hoyt and their successors, Morison, Son & Hoyt, and their successors, Morison, Son & Hutchinson, and their successors, Morison & Hutchinson, with a continuous and unbroken reputation and good-will, which were perpetuated, preserved and transferred from the establishment of said business in or about the year 1840 until in or about the year

1883, when the then owners of the business duly assigned, transferred and made over all their right, title and interest in the business to the firm consisting of Gardner S. Hutchinson, Henry B. Pierce, Ira Cole, and Thomas S. Morison, co-partners doing business under the firm-name Hutchinson, Pierce & Co., and the said firm, although it changed as to its membership by reason of death and withdrawals and the addition of new partners from time to time, was a continuous firm under the name Hutchinson, Pierce & Co., and the business was continuously and uninterruptedly owned and carried on by said firm of Hutchinson, Pierce & Co. from in or about the year 1883 until the business and the rights, all and singular, pertaining to said business and the good-will thereof and the trade-marks, trade-names, designations and indicia belonging or appertaining thereto, including the trade-mark hereinafter referred to, were duly transferred in the year 1895 to your orator, a corporation duly organized under the laws of the State of New York, which became in all things the owner and proprietor of said business and of all the assets of said firm of Hutchinson, Pierce & Co., and of its predecessors, all and singular, before mentioned, the same, all and singular, having been by your orator's said immediate predecessors to it fully conveyed, transferred and assigned.

And your orator says that its said business, to which it succeeded in the year 1895 as aforesaid, has been continuously carried on without interruption for over sixty years by your orators and its
3 predecessors and that all the property and business assets formerly owned by said firm, Hutchinson, Pierce & Co., and the firms and individuals to whom it succeeded, including the mechanical appliances, stock in trade, good-will, trade-marks, trade-names, and all property, legal and equitable, of said firms and individuals, are now the property of your orator in the possession, ownership and advantages of which your orator is entitled to be protected at law and in equity.

And your orator says that in the year 1883 said firm, Hutchison, Pierce & Co., succeeded to said business of manufacturing shirts, waists, underwear and furnishings and to the exclusive right to use in connection therewith as a trade-mark and trade-name to designate and indicate and identify the origin and genuineness of the same the arbitrary mark, symbol or designation "Star," which had been continuously for many years used and availed of as a trade-mark and trade-name by the predecessors in business of said firm of Hutchinson, Pierce & Co., and which continued to be used by said firm, Hutchinson, Pierce & Co., until your orator acquired the business, as hereinbefore set forth, and which has by your orator been continuously used and is now in use according to law as your orator's trade-mark and trade-name by it availed of to denote the shirts, waists, underwear and furnishings of its production.

Your orator shows unto your Honors that the use of the symbol of a star and the equivalent expression "Star" were original with your orator's predecessors; that is to say, your orator's predecessors were the first to make use of the symbol of a star as a mark or designation and the first to use the designation "Star" in connection with

shirts, waists, underwear or furnishings and the first to symbolize the expression "Star" by means of the word "Star" or the symbol of a star, or both the word and symbol, and that prior to the purchase and acquisition of said business by said firm of Hutchinson, Pierce & Co. in 1883, as aforesaid, the word "Star" and the symbol
4 of a star in connection with shirts had been continuously used for many years by the predecessors in business of said firm as a trade-mark and trade-name to denote the origin and genuineness of the shirts in said business produced by being marked upon each of the shirts manufactured by the predecessors in business of said firm in a prominent and conspicuous place thereon and in or upon pictures and drawings of said shirts used and availed of as advertisements, and otherwise, and on boxes, signs, packages and circulars issued by the predecessors in business of said firm and used in said business, and that long prior to the acquisition of said business by the said firm of Hutchinson, Pierce & Co. in 1883 the shirts in said business produced were well and widely known to the trade and public and were identified as the true and genuine products of said business by means of said trade-mark and were designated, asked for, bought and sold as "Star" shirts and by the representation or figure of a star, which shirts had for years been and continue to be extensively advertised at great expense through the newspapers, periodicals, circulars and in a multiplicity of other ways by means of said trade-mark and were in great demand under said designation and trade-mark, and when your orator's immediate predecessor, the said firm of Hutchinson, Pierce & Co., acquired the business, it was conducted and carried on substantially as it had been theretofore carried on, including the use of said symbol and designation "Star" as a trade-mark and trade-name for the shirts, waists, underwear and furnishings therein produced, except that the business was increased in magnitude and the popularization of said trade-mark and trade-name "Star" were greatly enlarged and extended.

Your orator further shows that since it acquired the business as aforesaid in the year 1895, it has continued without interruption to make use of the symbol of a star and the designation "Star" substantially as the same were used by its predecessors in connec-
5 tion with the shirts in said business produced and your orator continued at great expense extensively to advertise said shirts by means of said trade-mark through the newspapers, periodicals, by circulars and travellers, and in a multiplicity of other ways, and that said shirts continued to be sought after and sold in large quantities and identified as the true and genuine product of said business by means of said trade-mark, and in consequence of such advertising and publicity and of the merits of said shirts and other articles they continued to be and are now very popular and in great demand.

And your orator further says that for a period of more than fifty years, as well as prior thereto, said trade-mark "Star" expressed by the symbol or word, has been by your orator and its predecessors continuously and notoriously used and availed of as the mark and name under which its shirts have been marketed and sold and that each shirt of its production has for more than fifty years had applied

and affixed thereto the said trade-mark in the form of a symbol of a star or the word "Star" or both the symbol and equivalent word, as a distinctive mark of authenticity for the purpose of indicating the origin and genuineness of the article and to differentiate it from similar articles made by others, and the shirts of your orator and its predecessors in business have for more than fifty years been continuously known, identified, referred to, asked for, ordered and sold as "Star" shirts or by the symbol of a star, and the said trade-mark and trade-name "Star" in connection with shirts has continuously been widely and generally known and used throughout the markets of the United States and elsewhere by the trade and purchasers as a distinctive mark of authenticity to denote and identify the product of your orator's business and has had among the trade and with the public for more than fifty years an established and recognized meaning as indicating the shirts of your orator and them alone, for which a large demand has been created.

6 And your orator further says that its predecessors, said firm of Hutchinson, Pierce & Co., formally established its exclusive right to the exclusive use of the symbol of a star and of the equivalent word or expression "Star" as a trade-mark and trade-name for shirts in a number of suits in the Courts of the United States and in other Courts and that a number of Final Decrees have been entered in which the right of your orator's said predecessor to the exclusive use of said trade-mark "Star" was judicially ascertained and established. And your orator refers particularly to a certain suit which was instituted in the Circuit Court of the United States for the Northern District of Illinois in the year 1889, in which your orator's immediate predecessor, said firm of Hutchinson, Pierce & Co., were complainants and Jacob F. Blumberg was defendant, and in which, after a vigorous defense, a Final Decree was entered, by which Decree and the opinion of the Court handed down in connection therewith it was, after full investigation and deliberation, held that complainant's predecessors adopted the "Star" both in word and symbol as their trade-mark as early as 1859, which had been continuously used by the successive owners of the business upon the goods produced therein, so that "Star Goods" had come to be the common designation of the goods of said firm, which were called for and referred to as "Star" shirt or "Star" waist as the case might be, and that the use by the defendant of a star, although of a different number of points and combined with a crescent, was inequitable and should be enjoined, with an accounting, all as will more fully appear by the records of said Court or a duly authenticated copy thereof in this Court to be produced and to your Honors exhibited.

And your orator shows that since the decision of said suit, as well as theretofore, the goods of the production of your orator and its predecessors have been continuously known, identified and sold by

7 means of its said trade-mark "Star," which has been recognized and respected as your orator's trade-mark and trade name (except in a few instances where an imitation of said trade-mark has been availed of without your orator's consent, in all

which instances the use has been promptly discontinued on demand or suppressed and enjoined by legal proceedings) and as such has been in general use by the trade and public as meaning and denoting only your orator's products and as guaranteeing their origin and genuineness.

And your orator avers that by reason of the premises and the priority of adoption and long, continuous, exclusive and notorious use of the conception "Star," expressed by symbol or word, or both, in connection with its products and by reason of the meaning everywhere recognized and understood of said trade-mark "Star" when applied to shirts as guaranteeing the origin and genuineness of said shirts as being your orator's production, your orator is entitled to be protected in its exclusive use and against any and every use of the symbol of a star or the word "Star" (alone or in combination with other words or symbols) in connection with any shirt not of its production and particularly against the acts of the defendant hereinafter described.

Your orator further shows unto your Honors that its said trade-mark has been for many years, and more than fifty years, used by your orator and its predecessors in commerce among the several States of the United States and in commerce with foreign nations and that your orator, being the owner of said trade-mark, caused its said trade-mark thus by it owned to be duly registered as its trade-mark in the Patent Office of the United States, at Washington, District of Columbia, on the Third day of April, 1906, in accordance with the Act of Congress in such cases made and provided, as will more fully and at large appear by a certain certificate of registration numbered 51,146 to your orator issued in pursuance of the Act of Congress in such cases made and provided or a duly authenticated copy thereof in Court to be produced and to your Honors exhibited.

8 Your orator shows unto your Honors, on information and belief, that, with full knowledge of the premises and of the reputation of your orator's shirts and of the demand existing for the same and the use and meaning of your orator's said trade-mark consisting of the representation of a star or the word "Star" as indicating and identifying the origin and genuineness of your orator's shirts, Joseph Loewy, of the City of New York, in the State of New York, meaning and intending to divert and secure to himself some portion of the good-will of your orator's business of manufacturing and selling shirts and to destroy for his own profit by unlawful means the reputation and demand for your orator's shirts, wholly without your orator's consent and against its protest, has manufactured and sold shirts similar in kind to those of your orator, but of inferior quality, and has used upon said shirts and in connection with the sale of the same your orator's said trade-mark by marking upon the shirts by him, the defendant, sold and on printed matter used in connection therewith a star and has offered and sold shirts not by or for your orator made bearing a representation of a star and continues so to do notwithstanding your orator's repeated protests in the premises, in violation of your orator's rights and to its loss and injury.

And your orator says, upon information and belief, that the de-

fendant has sold shirts not by or for your orator made bearing said fraudulent mark in commerce among the several States and has, without your orator's consent, reproduced, counterfeited, copied, and colorably imitated your orator's said registered trade-mark and has affixed the same to merchandise of substantially the same descriptive properties as those set forth in your orator's said registration and continues so to do after due notification of the infringement, to your orator's great loss and injury.

And your orator charges, on information and belief, that by reason of the acts of the defendant aforesaid your orator's trade has been interfered with and profits which of right belong to your orator have been diverted to the said defendant and continue to be diverted and the public have been and continue to be misled and the shirts of the defendant have been sold and continue to be sold as the true and genuine shirts of your orator for many years known and in demand, as hereinbefore set forth, and that the use by the defendant of said infringement of your orator's said trade-mark has the effect of enabling and promoting the impairment of the reputation and demand for your orator's shirts and the fraudulent and unlawful sale and substitution of defendant's shirts as and for your orator's shirts, to your orator's loss and injury and the loss and injury of the public.

And your orator says that the good-will of its said business of manufacturing and selling shirts is of great value, amounting to many thousands of dollars and more than Ten thousand dollars, and the value of its right to the exclusive use of its said trade-mark consisting of a representation of a star or the word "Star" is many thousands of dollars and more than Ten thousand dollars, and that it cannot with certainty state the amount which it is entitled to recover from the defendant by reason of his infringement of your orator's said trade-mark, but upon information and belief your orator charges that the amount which it is entitled to recover by this suit by reason of the acts of the said defendant hereinbefore recited amounts to more than the sum of Three thousand dollars.

To the end, therefore, that your orator may obtain relief in this Honorable Court, where alone it can obtain relief, it humbly prays:

1. That the said Joseph Loewy may be made defendant to this bill of complaint and compelled to answer each and every allegation therein contained, but not under oath (an answer under oath being hereby expressly waived), the same as if directly interrogated as to each.

2. That the said Joseph Loewy may be compelled to render a full, true, perfect and complete account of all profits by him made by reason of the unlawful use of the representation of a star in connection with the manufacture and sale of shirts not produced by or for your orator and may be compelled to pay over the same to your orator, and in addition thereto may be compelled to pay to your orator the damages your orator has sustained by reason of said infringement, and that the Court assess the same or cause the same to be assessed under its direction, and that the amount thus assessed and found as the actual damages may be increased to three

times the amount thereof in accordance with the statute in such cases made and provided.

3. That an injunction issue herein perpetually restraining and enjoining the said Joseph Loewy, his clerks, attorneys, agents, servants and workmen, and all in privity with him or claiming or holding through or under him, from in any manner whatsoever making use in connection with any shirt or analogous article not by or for your orator made of the representation of a star or the word "Star", whether alone or in combination with other words or devices, or any word or device like or substantially like them or either of them in sound or appearance, and from selling and from offering to sell or otherwise disposing of any shirt or analogous article to which shall be applied in any form or manner whatsoever, either alone or in combination with other words or devices, the representation of a star or the word "Star", or any representation or word like or substantially like either of them; and otherwise in every way from infringing your orator's said trade-mark.

4. That a restraining order or preliminary injunction be issued without delay directed to the said Joseph Loewy, enjoining and restraining him as set forth in the next preceding paragraph numbered 3.

And, finally, to the end that equity may be done and the relief herein prayed for and all other relief that it may be righteous in the premises to administer may be afforded your orator, may it please your Honors such relief fully to grant, and to award
11 against the said Joseph Loewy a writ of subpœna of the United States of America issuing out of and under the seal of this Honorable Court, commanding him on a day certain therein to be named and under a certain penalty, to be and appear in this Honorable Court, then and there to answer all and singular the premises and to stand to and perform and abide by such further order, direction and decree as may be made against him.

And your orator, as in duty bound, will ever pray, etc.

ARCHIBALD COX,
Solicitor for Complainant.

ARCHIBALD COX,
Counsel for Complainant.

STATE OF NEW YORK,
County of New York, ss:

George S. Brown, being duly sworn, deposes and says: That he is the Treasurer of the corporation complainant named in the foregoing bill of complaint; that he has read said bill of complaint and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

GEORGE S. BROWN.

Subscribed and sworn to before me this 14th day of May, 1906.

[SEAL.]

THOS. W. FOLSOM,
Notary Public (51), *N. Y. Co.*

12 *Answer.*

(Filed July 2, 1906.)

In the Circuit Court of the United States, Southern District of New York. In Equity.

HUTCHINSON, PIERCE & Co., Complainant,
vs.
JOSEPH LOEWY, Defendant.

Defendant's Answer.

Answer of Joseph Loewy, Trading as Joseph Loewy & Company, to the Bill of Complaint of Hutchinson, Pierce & Co.

This defendant now and at all times hereafter reserving unto himself and all matter of benefit or advantage by exception or otherwise which can or may be had or taken to the manifold errors, uncertainties, insufficiencies, and imperfections in said bill of complaint contained for answer to said bill or to so much and such parts thereof as this defendant is advised it is necessary for him to answer unto, answering says:—

The defendant admits that he is an inhabitant of the City of New York, in the Southern District of New York, and a sole trader carrying on business under the firm name and style of Joseph Loewy & Company at said City.

But whether the said complainant is a corporation and doing business under and by virtue of the laws of the State of New York and having a principal place of business in the City of New York, defendant has no information sufficient to form a belief and
13 therefore denies and leaves the same to be proven as complainant may be advised.

Further answering the complaint of the complainant herein defendant alleges that he has not information sufficient to form a belief and, therefore, denies that the complainant is engaged in the business of manufacturing and selling shirts, waists, underwear and furnishings, and that it was founded in or about the year 1840 and that from the year 1840 to the present time has been continuing business and that it is a business of large proportion and a source of profit and benefit and advantage to the public and leaves the same to be proven as complainant may be advised.

Further answering the complaint of the complainant defendant alleges that he has not information sufficient to form a belief, and, therefore, denies that the business, if any, of the complainant, has been a continuous business owned and carried on by T. A. Morison and Hoyt, and the several successors named in the bill of complaint and that the complainant is or ever became in all things the owner and proprietor of said business and assets of the said firm of T. A. Morison and Hoyt and Company, and its several successors or is now

the lawful owner of any trade-mark originated or used by said T. A. Morison and Hoyt or their predecessors.

Further answering the complaint of the complainant, defendant has no knowledge sufficient to form a belief and, therefore, denies that the complainant in 1896 succeeded to the business alleged or to any business which had been continuously carried on without interruption for sixty years or any other period of time, and that the said complainant is now the owner of any such business alleged or any trade-marks, trade-names, property, legal or equitable of any such firm named which it is entitled to protect by law or in equity as against this defendant.

Further answering the complaint of complainant defendant alleges that he has not information sufficient to form a belief
14 and, therefore, denies that in the year 1883, any firm under the title or name of Hutchinson, Pierce & Company succeeded to any business of manufacturing shirts, waists, underwear and furnishings and the exclusive right to use in connection therewith as a trade-mark and trade-name the arbitrary mark, symbol, designation, "Star" or that any such symbol or designation has been continuously used and availed of as a trade-mark and trade-name by any of the firms and co-partnerships mentioned in the bill of complaint or that the complainant has continuously used and is now using the said symbol and designation "Star" as a trade-mark and trade-name for shirts, waists, underwear and furnishings and, therefore, leaves the same to be proven as complainant may be advised.

Further answering the complaint of complainant defendant alleges that he has not information sufficient to form a belief and, therefore, denies that the complainant's alleged predecessors were the first to use the symbol of a "Star" as a trade-mark or designation and the first to use the designation "Star" in connection with shirts, waists, underwear and furnishings, and the first to symbolize the expression "Star" by means of the said "Star" or the symbol of a "Star" or both the word and symbol, and that the said mark, or either, or any of them, have been continuously used for many years by this complainant or any predecessor, as alleged, upon any goods manufactured or sold by this complainant or any predecessors, as alleged, or upon any advertising matter, boxes, signs, packages, circulars or other matters issued by this complainant or any predecessors and that any goods of the description mentioned are or have been well and widely known to the trade and public and identified as the true and genuine products of said business by means of any such trade-mark or were designated, asked for, bought and sold as "Star" shirts, and by the representation or figure of a "Star" and that the popularization of said trade-mark and trade-name "Star" has greatly enlarged and extended and, therefore, leave the same to be proven as complainant may be advised.

15 Defendant further answering the complaint of complainant alleges that he has not information sufficient to form a belief and, therefore, denies that for a period of fifty years, or any other period of time, the said trade-mark "Star" expressed by the word or symbol has been, by the complainant, and its predecessors,

continuously and notoriously used as the mark and name under which any shirts or other goods have been marked and sold and that the said complainant or its predecessors have, for fifty years, or any other period of time, applied and affixed to any goods, as described, as a trade-mark, the form or symbol of a "Star" or the word "Star," or both the symbol and equivalent word, for the purpose of indicating the origin and genuineness of any such goods or articles, and differentiated the said goods and articles from goods and articles of similar make made and sold by others, and that any goods, which may have been made by the complainant or its predecessors, have been continuously known, identified, referred to, asked for, ordered and sold as "Star" shirts, or by the symbol of a "Star" or by the trade-mark or trade-name "Star" in connection with any such goods or that any such goods have been widely and generally known and used throughout the United States and elsewhere by the trade and purchasers as a distinctive mark and authenticity to denote and identify any such goods as the product of the complainant or its predecessors and, therefore leaves, the same to be proven as complainant may be advised.

Defendant denies upon information and belief that the complainant or its predecessors have ever established its exclusive right to the exclusive use of the symbol of a "Star" and of the equivalent word or expression "Star" as a trade-mark or trade-name for shirts or any other goods in the same class in any Court of law of the United States or any of the States or that any final decrees have been entered in which the right of complainant and its predecessors of the exclusive use of said trade-mark "Star" was judicially ascertained and established.

16 Defendant further answering the complaint of complainant alleges that he has not information sufficient to form a belief and, therefore, denies that the Circuit Court of the United States in and for the Northern District of Illinois at any time decided and held that the complainant's predecessors rightfully adopted the "Star" both in word and symbol so that "Star" goods has come to be the common designation of the goods of said firm, which were called for and referred to as "Star" shirts, and "Star" waists, as the case may be, and, therefore, requires that the complainant produce in Court a duly and properly authenticated copy of the proceedings, decision, decree and judgment set out in its bill of complaint.

Further answering the complainant's complaint defendant denies upon information and belief that since the alleged date of the alleged decision in the alleged suit, goods have been identified and sold by means of the trade-mark "Star" and that such trade-mark has been in general use by the trade and public as meaning and denoting only complainant's production and guaranteeing their origin and genuineness, and, therefore, leaves the same to be proven as complainant may be advised.

Defendant denies that complainant is entitled to be protected in the exclusive use and against any and every other use of the symbol of the "Star" and the word "Star" alone or in combination with other

words or symbols as a trade-mark upon any goods against any person whatsoever, and particularly against this defendant.

Defendant admits that one certain certificate of registration was issued by the United States Patent Office, bearing number 51,146, for an alleged trade-mark alleged to be owned by this complainant, but whether said registration in the Patent Office was in accordance with the Act of Congress in such cases made and provided, defendant has not sufficient information to form a belief and, there-
17 fore, requires that complainant bring into Court a duly authenticated copy of such proceedings.

Defendant denies any knowledge of the reputation of complainant's shirts or other goods or the amount of demand existing for the same, or the ownership by the complainant of the representation of a star or the word "Star" as a trade-mark or trade-name for said goods or any of such goods.

Defendant denies having diverted or continuing to divert, or to secure to himself any portion or portions of the good will of complainant's business, if such exists, in manufacturing and selling shirts, or to destroy for his own profits by any unlawful means, any reputation or demand which may exist of the complainant's shirts or goods or shirts or goods similar in kind to those of complainant's, if any there be, of any inferior or any other quality and that he has used upon shirts or any other goods in connection with the manufacture and sale of the same, the complainant's trade-mark or any mark, in the semblance of any trade-mark lawfully owned and controlled by the complainant upon shirts or any other goods, or on printed matter used in connection with the manufacture or sale of shirts or similar goods, any trade-mark or trade-name lawfully the property of the complainant, or has offered for sale any goods bearing said mark to the loss or injury of the complainant.

Defendant further alleges that he has never manufactured and sold, or offered for sale, any shirts or other goods, or issued any printed or advertising matter, in any manner bearing a star as a trade mark, or any mark in the semblance of a star alleged by complainant to be and constitute their trade-mark.

Defendant further denies that he has, at any time, or in any manner, reproduced, counterfeited, or copied any mark lawfully used by the complainant or used any mark substantially or approximately of the same description as any mark lawfully owned or used by the complainant or any mark liable to deceive the public or any individual of the public into believing that the said mark so used
18 by him was the mark of complainant or any mark used by complainant to identify any goods manufactured or sold by complainant.

Defendant further denies that the complainant's trade has been interfered with and profits which by right belong to the complainant have been diverted to said defendant or continue to be diverted or that the public have been and continue to be misled by any unlawful act of this defendant or that the shirts made or dealt in by this defendant have been sold or continue to be sold as the shirts or goods of the complainant, or that any trade of the

defendant has had or is having the effect of enabling and promoting the impairment of the reputation of and demand for the complainant's shirts or other goods and denies any fraudulent and unlawful sale and substitution of defendant's shirts or other goods to the complainant's loss and injury and to the loss and injury of the public.

Further answering complainant's complaint, defendant denies knowledge sufficient to form a belief as to the value of complainant's business, if any, and denies complainant's exclusive right to use as a trade-mark the representation of a star or the word "Star" or the value to complainant of the use of such trade-mark or trade-name, or any other trade-mark or trade-name used by complainant.

Defendant denies that complainant is entitled to recover, by this or any other suit, by reason of the accounts or premises herein and in the bill of complaint recited in the amount of three thousand dollars or any other amount whatsoever.

Further answering complainant's complaint, defendant alleges that on the first day of May, 1867, the business of which he is now the proprietor and conducting under the firm name and style of Joseph Loewy & Co. was established by one Leopold Loewy. That said business was continued without interruption by the said Leopold Loewy individually, until the year 1870, at which time one Morris Senftenberg and this defendant entered into co-partnership
19 with the said Leopold Loewy, said co-partnership doing business under the firm name and style of Loewy, Senftenberg & Co. That the said business was continued without interruption by the said Leopold Loewy, Morris Senftenberg, and this defendant up to April 1, 1879, when the said Morris Senftenberg retired from the business and the business was continued uninterruptedly by Leopold Loewy and this defendant under the firm name and style of Leopold Loewy & Bro. That said business was continued by Leopold Loewy and this defendant as co-partners uninterruptedly until Aug. 15, 1891, at which date this defendant acquired the interest of Leopold Loewy and continued the business uninterruptedly as a sole trader under the firm name and style of Joseph Loewy & Co. up to and including the present date.

Defendant further alleges that the present business and the goodwill of said business has been continuously and uninterruptedly conducted by this defendant and his predecessors in said business since May 1, 1867.

That at or about the day of inception of the said business the then proprietor of the business, Leopold Loewy, originated and used upon the goods made by himself and upon boxes containing said goods, and upon printed matter and advertising the symbol of a comet and the word "Comet," which said symbol and word, in combination, were used and have been continuously used by the said Leopold Loewy and his successors in the business, including this defendant, and from the said year 1867 to and including the present date, as a trade-mark or trade-name for the goods manufactured and sold by the said Leopold Loewy and his successors in business, including this defendant. That the business in which the said Leopold Loewy and his said succes-

sors, including this defendant, have been engaged is the manufacture and sale of shirts, waists, and similar goods, and that all of said goods have been so marked with the said symbol and word "Comet" and by no other trade-mark or trade-name.

20 The defendant further alleges that he and his predecessors at all times since on or about the inception of the said business in the year 1867, have used and is now using the said symbol of a "Comet" in combination with the word "Comet," and that he or his predecessors have continuously and exclusively used the said symbol and word "Comet" upon their goods, and upon the various packages in which their goods are shipped and marketed, and upon printed and advertising matter as a trade-mark and trade-name.

That the said mark used exclusively by this defendant and his predecessors, to wit, the symbol "Comet" and the word "Comet" does not in any manner resemble a "Star" such as is alleged to be used by the complainant, and is not such a mark as would deceive the public or any purchaser into believing that he was receiving the goods of complainant.

Defendant further alleges that his said use of the said mark consisting of the symbol of a "Comet" in connection with the said word "Comet" or the said symbol or word separately has been notorious and well known by the public and the trade since the inception of the said business in or about the year 1867, and that the use of the said mark and the use thereof by this defendant and his predecesors, is and was well known by the complainant corporation and its predecessors, and has been so known for a great number of years.

That the defendant and his predecessors in business, have used the said mark "Comet" for over thirty-nine years last past, and that at the present time or during said term of thirty-nine years this defendant and his predecessors have used no other mark, and is not now using any other mark upon shirts, waists, underwears, furnishings and similar goods.

The defendant and his predecessors having used the said mark "Comet" exclusively and only during the entire existence of the defendant's business, and the business of his predecessors, it is believed, that the said mark "Comet" is the mark referred to by the complainant, and by the complainant alleged to be an infringement

21 upon a mark "Star" alleged to be owned by complainant, and that the complainant having knowingly and without objection permitted the use of the said mark "Comet" for the period of time aforesaid, has been lax in enforcing or attempting to enforce any rights or fancied rights possessed by the complainant or its predecessors in the premises, and that the said complainant should now be estopped from interfering in any manner with the right of defendant and his successors to use the said mark "Comet" in any manner whatsoever.

Defendant further alleges that on or about the 29th day of March, 1906, he filed in the United States Patent Office an application for registration of the trade-mark above described consisting of the words "The Comet" and the representation of a "Comet." That after proceedings duly had in conformity with the statute in such cases made

and provided, the United States Patent Office did on or about the 4th day of June, 1906, allow the said application and pass the said registration for publication, and which was published in the Official Gazette of the United States Patent Office, of June 26th, 1906.

That notwithstanding the presence in the files of the United States Patent Office of the complainant's registration No. 51,146, as alleged in the bill of complaint for the same class of goods for which defendant's mark was allowed, the said complainant's mark was at no time during the proceedings had in the said matter cited by the Commissioner of Patents as an anticipatory reference, or in any manner interfering with the registration of defendant's mark, all as will fully appear by the records of said proceedings had, or a duly authenticated copy thereof in this court to be produced and to your Honors exhibited as your Honors may direct.

All of which matters and things this defendant is ready to aver, maintain and prove as this Honorable Court may direct; without this that any other matter, cause or thing in complainant's said bill of complaint contained, material or necessary for this defendant to make answer unto and not herein and hereby and well and
22 sufficiently answered, confessed, traversed, avoided or denied, is true to the knowledge and belief of this defendant.

Whereof this defendant humbly prays to be hence dismissed with his reasonable costs and charges in this behalf wrongfully sustained.

Defendant further humbly prays that the ownership and use of the said symbol "Comet" and the word "Comet" either singly or together be adjudged and confirmed to be in this defendant and to have resided in this defendant and his predecessors in business for the time alleged.

Defendant further prays that the complainant be adjudged to have had knowledge of the use and ownership of the said symbol "Comet" and the word "Comet" by the defendant and his predecessors for the length of time alleged, and that the complainant and its predecessors is and have been lax in enforcing or attempting to enforce against this defendant or his predecessors in business any rights of action or for infringement which the said complainant or its predecessors may believe or may have believed itself or themselves entitled to prosecute, and that the said complainant, its successors, officers, agents, servants, attorneys, employees or others deriving their authority from the complainant or its successors, be forever enjoined from interfering in any manner with the use of the said symbol "Comet" or the word "Comet", singly or in combination, by this defendant or his successors, or any person deriving authority from this defendant or his successors.

Defendant further prays this Honorable Court for such other and further relief as may be just and equitable in the premises.

JOSEPH LOEWY.

IRA JAY DUTTON,
Solicitor for Defendant.
EDWARD T. FENWICK,
Of Counsel.

New York, N. Y., June 30, 1906.

23 *Replication.*

(Filed August 6, 1906.)

Circuit Court of the United States, Southern District of New York.
In Equity.

HUTCHINSON, PIERCE & Co., Complainant,
vs.
JOSEPH LOEWY, Defendant.

The Replication of Hutchinson, Pierce & Co., Complainant, to the Answer of Joseph Loewy, Defendant.

This repliant saving and reserving unto itself now and at all times hereafter, all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto says that it will aver, maintain and prove its said Bill of Complaint to be true, certain and sufficient in law to be answered unto, and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by this repliant. Without this that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied is true. All which matters and things this repliant is and will be ready to aver, maintain and prove as this Honorable Court shall direct, and humbly prays as in and by its said Bill it has already prayed.

ARCHIBALD COX,
Complainant's Solicitor.

24 *Testimony.*

United States Circuit Court, Southern District of New York.

HUTCHINSON, PIERCE & COMPANY, Complainant,
vs.
JOSEPH LOEWY, Defendant.

Testimony on behalf of the complainant, taken pursuant to notice, under and pursuant to the 67th Rule of the Supreme Court as amended, before John A. Shields, Esq., Standing Examiner, at the office of Archibald Cox, Esq., No. 229 Broadway, Borough of Manhattan, New York City, on Wednesday, October 17, 1906, at 12 M.

Appearances.

Mr. Archibald Cox and Messrs. Phelps, Evins & East, for the Complainant.

Mr. Edward T. Fenwick, Mr. Ira J. Dutton and Mr. L. L. Morrill, for Defendant.

FREDERICK W. STEARNS, called and sworn as a witness for complainant, testified as follows:

Direct examination by Mr. Cox:

Q. 1. Kindly state your full name, age, residence and occupation?

A. Frederick W. Stearns; age, 49; residence, Bridgeport, Connecticut; occupation, superintendent of Hutchinson, Pierce & Company Star shirt factory; also secretary of the Company.

Q. 2. How long have you been connected with Hutchinson, Pierce & Company?

A. Since 1874.

25 Q. 3. Continuously?

A. Continuously.

Q. 4. Was the business now carried on under that name incorporated when you first joined it?

A. No, sir.

Q. 5. It is a corporation now, is it not?

A. Yes, sir.

Mr. FENWICK: The last question and answer are objected to for the reason that it is not the best evidence of the incorporation of the Company.

Q. 6. What is the business of Hutchinson, Pierce & Company?

A. Manufacture of shirts; stiff bosom shirts, neglige shirts, both boys and men; boys' shirtwaists; underwear, cut underwear of all descriptions.

Q. 7. And those articles, or many of them, are manufactured in the factory in Bridgeport, of which you are superintendent?

A. A part of all.

Q. 8. How, if at all, are the articles or the packages in which they are shipped marked?

A. All shirts have—all our articles we manufacture have a woven label on them. Is that what you mean, sir?

Q. 9. Yes.

A. Woven label. A star with the words trade mark. "Trade" on one side and "mark" on the other.

Q. 10. And how are the packages in which the articles are shipped marked?

A. The boxes have labels on with Star shirt—of course, that varies—but with a six-pointed star in the middle, I think, of the label with "trade mark" on each side. I won't be positive about that latter statement, but I think so. This varies from time to time.

Q. 11. Could you recognize the labels if you saw them?

A. Yes, sir.

Q. 12. Kindly look at the label I now hand you, and state whether that is the label to which you referred?

A. Yes, sir, that is the label.

Q. 13. How long has a label like that been used by Hutchinson, Pierce & Company, and its predecessors to your knowledge?

A. As long as I can remember, sir; that is, I mean as long

26 as I have been with them. I don't know whether it is relevant for me to make a statement here when I first went with

POOR

them—a great many of their shirts were put up in half dozens in papers with that stamp on them.

Mr. Cox: I don't think that is material.

Q. 14. And has that label been the only label upon the package of shirts upon which it appears?

A. That or a similar one. There may be a little change in the printing of it. That is, I mean sometimes it went around this way (indicating).

Q. 15. That is to say, have the labels always borne simply the representation of a star or the word "Star" without any name of the manufacturer?

A. To the best of my opinion; yes, sir.

Q. 16. You don't recall ever having seen any which had the Company's name on them?

A. No, sir.

Q. 17. You spoke of the woven label which goes on the garments themselves. Will you kindly look at the specimen I now hand you and state whether that is a specimen of the label to which you referred?

A. Yes, sir, barring the size.

Q. 18. That is the size represented by the figure 2 on that particular specimen may be omitted or varied in other labels?

A. Yes, sir, that is (indicating) a pajama label or boy's waist.

Q. 19. Kindly look at the specimen I now show you and state whether that is the woven label that goes on shirts.

A. That is the label that goes on shirts.

Q. 20. And how long has that been used by the complainant and its predecessors on the articles of its manufacture to your knowledge?

A. As long as I can remember, which is forty odd years.

Q. 21. And have the articles themselves borne the corporate name or any mark other than that illustrated by the article last shown you?

A. Nothing except the stamp size and lot.

Q. 22. Have you knowledge of the fact that the complain-
27 ant has registered the mark shown on the labels to which you have referred as a trade mark?

A. No personal knowledge, no sir, except as I have been informed.

Q. 23. That is to say you have been informed?

A. That it was a registered trade mark, and I know they had some litigation years ago about it; I have seen the decisions and so on; nothing more than that.

Mr. Cox: I will offer in evidence the certificate of registration No. 51,146, dated April 22, 1905.

The same is marked "Complainant's Exhibit Complainant's Registration, Oct. 17, 1906, J. A. S., Ex'r."

Mr. MORRILL: Defendant objects to the introduction of the Exhibit for the reason that it is not properly authenticated, and for the further reason that no proper foundation for the introduction has been laid.

Mr. Cox: Complainant also offers in evidence the box label and shirt label referred to by the witness.

COPY

The same are marked "Complainant's Exhibit Box Label and Complainant's Exhibit Shirt Label, respectively J. A. S., Ex'r, Oct. 17, 1906.

Q. 24. In the case of Complainant's Exhibit Shirt Label, I understand that only one of these stars goes on each shirt?

A. Yes, sir.

Q. 25. That is, there are half a dozen labels on this strip?

A. Yes, one on each shirt.

Q. 26. Will you kindly look at the shirt and bill which I now hand you, and state if you recognize them, and what you know about them?

A. I recognize the shirt and the bill. On the 28th of June I bought this at the Busy Store in Bridgeport, corner of Fairfield avenue and Middle street, Bridgeport, Conn. Price fifty cents.

28 Q. 27. And the bill was given you at that time?

A. At that time, with the shirt.

Q. 28. What year was that?

A. 1906.

Mr. Cox: I offer the shirt and bill in evidence.

The same are marked respectively "Complainant's Exhibit Defendant's Shirt and Complainant's Exhibit Defendant's Bill, J. A. S., Ex'r. Oct. 17, 1906."

Mr. MORRILL: Defendant objects to the introduction of the exhibits for the reason that they are not in any way properly connected with the matter in question.

Q. 29. Will you kindly state, as near as you can remember, what transpired exactly when you made the purchase referred to in the Busy Store at Bridgeport?

A. I went and saw the shirt hanging in the window with a Star on it, which interested me, and I went in and asked for a Star shirt. The girl hesitated and said she didn't know that she had a Star shirt. I said, "You have got a shirt hanging in the window with a star on it." "Oh, yes," she says, "we can sell you one of those." She went to the window and got this shirt out and sold it to me.

Q. 30. And you bought it?

A. I bought it.

Cross-examination by Mr. MORRILL:

X Q. 31. Mr. Stearns, I don't know that I quite understand your testimony in relation to these labels, or the box label or both. I want to ask you if you testify that the name of the complainant firm never appears upon these labels or the box label; that is if these labels, I mean, the shirt labels?

A. Yes, sir.

X Q. 32. It never appears?

A. No, sir, not to my knowledge.

X Q. 33. You say not to your knowledge. Does that apply to all of these shirts made by Hutchinson, Pierce & Company or

29 only to those garments made at Bridgeport?

A. To all of them, either at Bridgeport or Norwalk.

X Q. 34. Do you want to be understood as stating that the firm of Hutchinson, Pierce & Company never at any time used labels with the star on them and the name of the manufacturing company?

A. You mean the woven labels?

X Q. 35. Either of the labels, shirt or woven label or box label?

A. That is it.

X Q. 36. What is it?

A. I mean without the firm's name.

X Q. 37. You mean they never used the firm name with the label?

A. Not to my knowledge, no, sir.

X Q. 38. Well, to your knowledge is not quite definite enough. Did the firm or did the firm not use labels, either the shirt labels or box labels with the name?

A. I was born in 1857, and I can't go back to 1840, but since I have been of any age and remember the firm or known of their production, I have never seen it.

X Q. 39. How far back is that?

A. Well, I have been connected with the firm, as I said, since 1874.

X Q. 40. Since 1874?

A. And as I say, my uncle being Mr. Hutchinson, I was in the store a great deal and got shirts from there prior to that as a small boy.

X Q. 41. Your knowledge as being connected with the firm dates back to 1874?

A. Yes, sir.

X Q. 42. And since 1874 the firm has not used labels with its name upon them—have never since that time used labels with its name on them?

A. To the best of my memory, I say no.

X Q. 43. You, I suppose, would not be willing to swear positively that they had not used labels either before or since 1874 with their name on them? I understand you are secretary of the company?

A. I have simply been secretary of the company for a week, so that don't amount to anything; but I have been manufacturing for them since the 1st of September, to the best of my knowledge it was in 1875.

30 X Q. 44. Now, you entered the firm in 1874. Your connection with the firm in 1874 was in what capacity?

A. Making myself generally useful.

X Q. 45. Can't you give us a little more definite answer than that?

A. I dusted off the boxes, and marked the boxes, packed them up, helped to pack them and sort of got out orders, and did anything I was told to as a young man.

X Q. 46. How long since you became manager of the Bridgeport end of the business?

A. I was superintendent of the flannel department in 1890; we had two superintendents. I have been general superintenden- for the past three years.

X Q. 47. Then your knowledge as a supervising employee, we will say of the company dates back only to 1890?

A. Oh, no; I had been in Norwalk from 1879 until 1890, when I was transferred to Bridgeport.

X Q. 48. In what capacity were you in Norwalk?

A. I was superintendent of what they call the custom department at that time.

X Q. 49. Since what time?

A. First day of May, 1879, to November 15, 1887-1889.

X Q. 50. Then your knowledge as a supervising employee dates back to 1879?

A. As to the manufacturing end. Well, no, I go back further than that. Excuse me. First I started my manufacturing. We had a department in New York to the best of my recollection, it was about 1st of December, 1875, that I started up there in the custom department. We transferred the department to Norwalk in 1879, the 1st day of May.

X Q. 51. Does the complainant firm use any other label on their boxes than the one in evidence?

A. Yes, sir.

X Q. 52. What labels do they use? What other labels? What is on them, what wording?

A. Why there are special labels made for special firms at times, the same as the special woven labels are used.

X Q. 53. What appears on some of those labels for in-
31 stance?

A. Well, I can cite Rogers, Peet & Company.

X Q. 54. What appears on the Rogers, Peet labels?

Mr. Cox: I object to that as immaterial and irrelevant and not cross-examination, and in no way concerned with this suit or anything involved in it.

X Q. 55. Answer the question, please? (X Q. 54 repeated.)

A. I couldn't give it to you, sir. I can't answer it because it is not clear enough in my mind, they change it so often.

X Q. 56. Are there any labels for other firms that the complainant company put on the box that you can remember?

A. Why, there are quite a number of different firms who furnish a box label, but it don't come to my mind I could describe them.

X Q. 57. Are all of the goods manufactured by the complainant company put out under other firm's names? That is, you mentioned Rogers, Peet & Company. Are those goods, for instance, put out under the name of Rogers, Peet & Company?

A. No, they all have the star; what we call the combination label made for Rogers, Peet & Company.

X Q. 58. Does Rogers, Peet & Company's name appear on that label?

A. Yes, sir.

X Q. 59. Does the star appear on the same label with Rogers, Peet & Company?

A. Yes, sir.

X Q. 60. Does that label you mentioned there also appear on the same box with Rogers, Peet & Company's label?

A. This label here (indicating)?

X Q. 61. That box label in evidence?

A. No, sir, I should say that it was what might be termed a combination box label as well.

X Q. 62. Now, go back to the question I tried to get at before. Are any of the goods that the complainant company puts out provided with this label on the box only?

A. Oh, yes.

X Q. 63. On the box with that label, is there any label or
32 other way of putting on the complainant company's name on the box anywhere?

A. No, sir.

X Q. 64. Does the complainant company's name appear on any of the boxes or packages containing shirts or other garments that are manufactured by the complainant company?

A. No, sir.

X Q. 65. Now, Mr. Stearns, what I want to get at is this: Does the complainant company make or sell any goods of the nature described in the bill of complaint upon which their name as manufacturers, wholesalers or other dealers appears upon the goods, boxes or packages in which the goods are packed, shipped or sold?

A. No, sir.

X Q. 66. Now, Mr. Stearns, do you want to qualify that last statement in any way?

A. I want to simply say I won't make a statement that on the shipping cases in which are packed 10 or 15 or 20 dozen of these half dozen or quarter dozen boxes that there may not be "from Hutchinson, Pierce & Company," the same as there would be on the end of an envelope; that I didn't say.

X Q. 67. Now, you have qualified that as regards to packing cases in case of a shipment of a small lot to say one dozen shirts. You wouldn't want to say the name of Hutchinson, Pierce & Company did not appear upon the wrapper that was wrapped in?

A. No, sir, I wouldn't say that.

X Q. 68. Mr. Stearns, has the complainant company any shipping labels or tags upon which the name of Hutchinson, Pierce & Company appears, either with or without the star?

A. I can't say.

X Q. 69. Did you have charge of the shipping, the supervision of the shipping?

A. From the Bridgeport end.

X Q. 70. Do they not use any shipping tags or labels there on the goods?

A. On the boxes?

X Q. 71. On the boxes or other packages they ship goods in—any shipping tags or labels?

A. Why, the cases are marked for their destination.

X Q. 72. You mentioned in your testimony shirts manufactured for Rogers, Peet & Company?

A. Yes.

33 X Q. 73. Now, can you estimate about how many other firms you make those special brands of goods for—just roughly?

A. No, sir.

X Q. 74. Are there a great many of them?

A. They are being reduced all the time.

X Q. 75. Are there still quite a number of them?

A. There may be in this coming season, and there may not be any.

X Q. 76. In the last past season??

A. Yes, there were quite a number of them.

X Q. 77. Couldn't you estimate*ly* approximately how many, whether it was 100 or a thousand or 10,000?

A. It would simply be guesswork. I couldn't answer it, no, sir.

X Q. 78. Could you tell whether it was 100 or 10,000?

A. Well, it is between the two.

X Q. 79. It is more than 100 and less than 10,000?

A. Well, it might not be a hundred; I am not in a position to say, sir.

X Q. 80. Now, on all of these goods you manufacture, these special orders,—does the name of the firm for which you manufacture them appear?

A. Oh, no.

X Q. 81. Do they in the majority of cases?

A. No.

X Q. 82. Do they in some of the cases?

A. Yes, sir.

X Q. 83. What ordinarily else in a general way would appear upon those labels besides the name of the party for whom you manufacture those shirts?

A. Well, "made for."

X Q. 84. Take Rogers, Peet & Company for example?

A. They have what we call a combination label, which has our trade mark, the same as this (referring to Complainant's Exhibit Defendant's Shirt Label). It would have underneath the star here, or maybe over it, "Rogers, Peet & Company," and often, in some instances have "made for Rogers, Peet & Company." I won't state that positively about that combination label.

X Q. 85. But their name would appear on it with the star?

A. Rogers, Peet, yes.

34 X Q. 86. You state, too, that there are instances where the name appears upon the label with the star and without the words "made for," as, for instance, take the name we have been using, Rogers, Peet & Company, with the star beneath it or above it without the words "made for"; is that correct?

A. I think in all cases it is "made for."

X Q. 87. Do you wish to be understood by your last answer that none of these labels for the special orders contained the name of the party for whom the shirts are made with the star and without the words "made for"?

A. To the best of my knowledge we make none without the "made for" on it.

X Q. 88. Does this apply to all special orders?

A. No, sir, we make a great many special stock lots that have no name on it at all, just our star. A large majority of our stock lots—what we call special stock lots—are made simply that way, but there are firms that request their labels to be put on in place of ours, and whenever it is put on in conjunction with ours, you find the Star on top and the special label which they furnish is put underneath, and in all cases, it says, "made for." Meggs & Company, of Bridgeport, for instance.

X Q. 89. You say they furnish their labels?

A. Their own labels.

X Q. 90. Their labels with their name on and also with the star thereon?

A. No, sir.

X Q. 91. The star isn't on?

A. No, sir.

X Q. 92. In no case, no instance?

A. Not that they furnish; when it is a combination label, we furnish it.

X Q. 93. You furnish the label?

A. Yes.

X Q. 94. Then the name of the firm appears with the star?

A. Yes, sir.

X Q. 95. And your name does not appear—that is the name of the complainant company does not appear?

A. No, sir, on no label.

Adjourned to Thursday, October 18, 1906, at 10 A. M.

35 NEW YORK, *October* 18, 1906.

Met pursuant to adjournment.

Present: Counsel as before.

JOSEPH LOEWY, called and sworn as a witness on behalf of the complainant, testified as follows:

Direct examination by Mr. COX:

Q. 1. Mr. Loewy, you are the defendant in this case, are you not?

A. Yes, sir.

Q. 2. And you carry on business under the name of J. Loewy & Company?

A. Yes, sir.

Q. 3. And the business of J. Loewy & Company is what?

A. Shirt making.

Q. 4. Will you kindly look at the shirt which I hand you marked Complainant's Exhibit Defendant's Shirt, and state whether that is one of the shirts of your manufacture?

A. I couldn't swear to that.

Q. 5. You can't tell whether it is or not?

A. I couldn't, no, sir.

Q. 6. You observe the mark in the upper part of the shirt near the neck band?

A. Yes.

Q. 7. Do you mark the shirts of your manufacture with a mark identical to that?

A. Not identical, a similar mark.

Q. 8. How then does it differ from the mark?

A. I can't tell; I ain't got my mark with me.

Q. 9. Do you think it does differ at all?

A. It might; it might not.

Q. 10. Well, what point are you doubtful about? Where do you think there might be dissimilarities?

A. In the whole construction; I can't say except I saw the two marks together, the size.

Q. 11. Does the mark you use have a star with a tail to it like that?

A. Yes, some similar mark, yes, sir.

Q. 12. But it has the same star?

A. Yes, sir, similar to that.

36 Q. 13. Do you think that might be your mark? You wouldn't say it was not?

A. I wouldn't swear to that, either way.

Q. 14. Is there no way you can tell a shirt as being of your manufacture?

A. Not quite well; we all make the shirts alike.

Q. 15. There is nothing except the mark to say who it is manufactured by, is there?

A. Yes, sir.

Q. 16. What else?

A. The cloth is made for a good many; not only for one.

Q. 17. The cloth is?

A. Yes.

Q. 18. It all depends on the mark; that is the only way to tell who makes it?

A. About, yes; we consider that to be manufactured by—the cheapest shirts are made likewise by a good many manufacturers.

Q. 19. And the only way you can tell one manufacturer from the other is the trade mark; is that right?

A. Yes, sir, that is about right.

Q. 20. And the trade mark on that particular shirt before you, is either your trademark or one very like it?

A. Some similar trademark, yes; a similar mark.

Q. 21. You put upon your shirts, as I understand, a mark so like that that you can't point out any feature wherein it differs?

A. Well not very well, except I have not got my mark with me. Many imitations made, too. There are imitations made of this mark too.

Q. 22. That is either your mark or an imitation of it? Is that a fair way of stating it?

A. I can't understand.

Q. 23. Well, we will put it in a different way: You manufacture shirts where, here in New York?

A. Here in New York.

Q. 24. And where are they sold?

—. All around the United States.

Q. 25. Do you know whether any of them are sold in Bridgeport?

A. Might be.

Q. 26. And those shirts that you manufacture and that are sold in various parts of the United States bear a mark which has
37 a star on it like the star shown in Complainant's Exhibit Defendant's Shirt; is that right?

A. Some similarity with it, yes.

Q. 27. Well, it is the same sort of a star?

A. Similar star, yes, sir; something similar, yes; I would not swear that this is a star, but something similar to that.

Q. 28. Have you advertised your shirts?

A. Yes, sir.

Q. 29. Will you kindly look at the advertisement I now hand you and state whether that is the kind of advertisement you have used in advertising?

A. It might be, but I don't attend to the advertising, so I wouldn't swear that I seen it, even. It might be; it looks like one of our advertisements.

Q. 30. It looks like one of your advertisements?

A. Yes, sir.

Q. 31. You know, do you not, that you advertise in the same way as that?

A. Yes, sir, some similar way to that.

Q. 32. And the name of that advertisement and the address, are your name and address, are they not, or the name and address of your business?

A. That was at the time. You see that is Lispenard street there.

Q. *32.* You have issued advertisements, have you not, bearing the star with the tail, as shown there?

A. I suppose a similarity to it, yes.

Q. 33. Well, you haven't any doubt that is one of your advertisements, have you?

A. Well, I wouldn't swear to it, but that is a similar advertisement as I did in the Haberdasher.

Mr. Cox: I offer that in evidence.

Mr. Morrill: Counsel for defendant objects to the introduction of this exhibit on the ground that it has not been properly identified as in any way connected with the suit or with the defendant's business.

Marked "Complainant's Exhibit Defendant's Advertisement, Oct. 18, 1906, J. A. S., Ex'r."

38 Q. 34. You use letter paper having your own letter heads in your business, do you not?

A. Yes, sir.

Q. 35. Will you kindly look at the letter head I now hand you, and state whether that is a specimen of the letter heads used by you?

A. I think it is a similar letter head; yes, sir; we use that letter head.

Q. 36. Isn't it exactly the same as the letter head used by you?
A. If I see it; it might be the same, yes, sir, as our letter heads.
Q. 37. Well, the letter heads used by you have the star contained in the sample, as shown there, do they not?
A. In a similar way, yes.
Q. 38. When you say "similar," you mean the same, don't you?
A. Yes, similar style.
Q. 39. Well, what is the difference between that and the ones which actually appear on the letter heads used by you?
A. Because we change even the letter heads. We don't have these stars appear on the letter heads; we haven't got that letter head all the time.
Q. 40. You don't use that all the time?
A. Oh, no; this is only a fancy of my boys to put that in. I was opposed to that myself.
Q. 41. You were opposed to that?
A. I didn't like the red.
Q. 42. Didn't like the red?
A. No.
Q. 43. Do you use the same sort of letter head, only printed in black?
A. No, not quite.
Q. 44. You remember at one time you did use letter heads like that?
A. I suppose, yes.

Mr. Cox: I offer that in evidence.
Marked "Complainant's Exhibit Defendant's Letter head, Oct. 18, 1906, J. A. S., Ex'r."
Mr. Morrill: Counsel for defendant objects to the introduction of this exhibit on the ground it has not been properly identified as in any manner connected with this cause of action or the defendant's business.

39 Q. 45. What sort of letter heads do you use now? Do they show the star in the same way as that letter head?
A. I am not positive; I couldn't tell.
Q. 46. Do you attend to your own business every day?
A. Yes, sir.
Q. 47. Don't you frequently sign letters?
A. I do not; not always.
Q. 48. Don't you frequently do it?
A. Sign letters, no.
Q. 49. Never sign letters?
A. Very seldom.
Q. 50. You never see the letters that go out from your business?
A. Not always.
Q. 51. Well, how often do you see them?
A. Might be some rare occasions.
Q. 52. Oh, you don't attend to your own business?
A. Not to the letter writing.
Q. 53. Who attends to the letter writing.

A. The bookkeeper.

Q. 54. And what part do you do?

A. General overseeing.

Q. 55. You saw the letter head to object to the red, didn't you?

A. Yes, but it was after it was printed.

Q. 56. Well, did you use up what was printed?

A. I suppose we had to.

Q. 57. And you have no idea of the sort of letter head you use now?

A. I couldn't tell exactly.

Q. 58. Well, can you give me any idea?

A. Well, it might be the same; same that there is on this here, only no red star in it.

Q. 59. No star at all?

A. No star at all even.

Q. 60. Are you willing to swear that is the kind of letter head you use now?

A. I would not swear to it, because I want to see them first; I am not positive.

Q. 61. Well, you say it might be. Have you ever seen any without the star?

A. Sure, we had them without the star.

Q. 62. When did you have that?

A. Only the name Comet and no star.

Q. 63. What?

A. Only the name Comet and no star.

40 Q. 64. When was that?

A. All the time we had them.

Q. 65. Then you have two kinds or had two kinds, one with the star and one with just the name Comet?

A. No, only the way the young fellows feel like it; they try to improve.

Q. 66. Tried to improve by adding the star in red?

A. By adding sometimes the star and sometimes something else.

Q. 67. And you remember that once they tried to improve by adding the star in red as shown there?

A. I suppose so; that is a few years ago.

Q. 68. And you don't know what kind of letter heads you use now at the present time?

A. I really don't know if there is any star in it or not. There is a Comet in it anyway.

Q. 69. But you don't know whether the star is there; it may be just the word?

A. I can't tell; no star; we never used the word "star."

Q. 70. But you have used the symbol of a star?

A. We did not took it for that.

Q. 71. Do you remember receiving a letter from Phelps & East requesting you to discontinue the use of the star on shirts as an infringement of the trade-mark of Hutchinson, Pierce & Co.?

A. I slightly remember it, yes, sir.

Q. 72. And you remember receiving a letter from me subsequently to the same effect?

A. That I would not swear to; I can't remember.

Q. 73. Well, you remember that Hutchinson, Pierce & Co. through some one did complain of your use of the star, do you?

A. Yes, sir.

Q. 74. And you continued applying it to your shirts just the same notwithstanding that protest, did you not?

A. Because I had no star in my emblem.

Q. 75. That is the reason you did it?

A. Yes, sir.

Q. 76. But you did continue just the same?

A. Sure.

Q. 77. And the emblem that you had no star in, as you
41 say, was the same as the one shown on the shirt here?

A. Some similarity, yes, sir.

Q. 78. That is it had a star neither to a greater nor less extent than that?

A. There was always some similarity with this one here. We call it a Comet, no star. Never use the word "star."

Q. 79. Well, you speak of some similarity. The point I want to get at is whether it always had that figure of a star?

A. It might have some figure, yes, sir.

Q. 80. Well, did it? You say it might have?

A. Well, I suppose so; we don't consider that a star; we call it a comet. A comet is not a star.

Q. 81. Well, what I want to get at is not the word, the figure, the star with a tail to it?

A. Yes, we don't call it a star.

Q. 82. I don't care what you call it. What I am trying to get at is whether you continued to put on your shirts a figure like that (referring to Complainant's Exhibit Defendant's Shirt)?

A. Yes, sir, I suppose we did.

Q. 83. Well, you know you did, don't you?

A. Yes, sir.

Cross-examination by Mr. FENWICK:

X Q. 84. How long have you been in the shirt business, Mr. Loewy?

A. Since about 1872.

X Q. 85. Has your business been extensive or small—in the manufacture of shirts has it been extensive or small during that period?

A. If you will allow me to explain, I started in making shirt fronts or bosoms, and after that went on a small scale in the shirt line because I didn't have much money. I made shirt fronts in 1870 and shirts in 1872 about two years later on a small scale.

X Q. 86. Has your business continually grown in the manufacture of shirts since 1872?

A. Yes, sir.

X Q. 87. Are you to-day quite an extensive manufacturer
42 of shirts, what might be called quite an extensive manufacturer of shirts?

A. About belonging to the medium class.

X Q. 88. Under what name? Did you apply any name to your shirts?

A. Yes, sir.

X Q. 89. What name?

A. Comet.

X Q. 90. Under what name are these shirts known on the market?

A. Comet shirts.

X Q. 91. Did you ever apply the word "star" to any shirts made by you?

A. Never did; never had any reason.

X Q. 92. Have you ever applied the representation of a star on shirts manufactured and sold by you?

A. No, sir, never.

X Q. 93. When did you first commence using the representation of a comet on shirts?

A. My brother had been using it before me, and in 1876 I joined my brother, and we were fourteen years together under the firm name of L. Loewy & Brother.

X Q. 94. From what date did your brother commence using the representation of a comet on shirts?

Mr. Cox: That is objected to as calling for testimony beyond the knowledge of the witness.

A. About 1872.

X Q. 95. Have you personal knowledge of that fact?

A. Yes, sir.

X Q. 96. And in 1876, you joined your brother in the manufacture and sale of shirts?

A. Yes, sir.

X Q. 97. Has the business been continuous by use since 1876?

A. Up to 1891; we were together about fourteen years.

X Q. 98. From 1891 under what name has the business been carried on?

A. Formerly by L. Loewy & Brother.

X Q. 99. From 1891 under what name has the business been carried on?

A. Under J. Loewy & Company; my name.

43 X Q. 100. From 1876 to 1891, under what name was it?

A. From 1876 to 1891 under L. Loewy & Brother.

X Q. 100*a*. Were you a member of the firm of L. Loewy & Brother?

A. Yes, sir.

X Q. 101. From 1876 to 1891?

A. Yes, sir.

X Q. 102. And from 1891 you have carried on the business personally up to the present time?

A. Yes, sir, buying out my brother.

X Q. 103. Then, as I understand it, you went alone in the manufacture of shirt fronts in 1870?

A. Yes, sir.

X Q. 104. And 1872 in the manufacture of shirts which you continued to conduct alone until 1876?

A. Yes.

X Q. 105. And then joined your brother?

A. Yes.

X Q. 106. Under the firm name of—what is it?

A. L. Loewy & Brother.

X Q. 107. Which firm continued until 1891?

A. Yes, sir.

X Q. 108. And in 1891 you bought out your brother?

A. Dissolved partnership.

X Q. 109. You say you bought out your brother, dissolved partnership, you buying out your brother and continued the business of shirts down to the present time; is that it?

A. That is correct, yes, sir.

X Q. 110. During that period from 1872 to the present time the representation of a comet has been used continuously on shirts manufactured by your brother from 1872 to 1876, and by you and your brother from 1876 to 1891, and by you alone from 1891 to the present time; is that correct?

A. That is correct; yes, sir.

X Q. 111. Do you use any word in connection with the representation of a comet on shirts made and sold by you?

A. The name "Comet."

X Q. 112. Do you always use the word "comet" in connection with the representation of a comet on shirts made and sold by you?

A. Yes, sir.

X Q. 113. The place of business of Hutchinson, Pierce &
44 Co. is in New York City, is it not?

A. Yes, sir.

X Q. 114. Have you ever used the word "star" or representation of a star on a shirt made and sold by you?

A. Never did.

X Q. 115. About how long ago was it that you first received notice from Hutchinson, Pierce & Co. or their attorneys, alleging that you were infringing upon their trade-mark?

A. I think that is around 1903—about three years ago, now.

X Q. 116. Is that the first notice you ever received from that firm or their attorneys?

A. Yes, sir.

X Q. 117. Claiming that you were infringing their mark?

A. Yes, sir.

X Q. 118. When you received this notice, about 1903, did you continue to use your comet trade-mark on shirts as heretofore?

A. Yes, sir.

X Q. 119. About when was the last time you received notice from Hutchinson, Pierce & Company, or their attorneys, that you were infringing upon their trade-mark?

A. When I received Mr. Cox's complaint.

X Q. 120. About how long ago was that?

A. That is only a few months ago.

X Q. 121. Did you receive any notices from Hutchinson, Pierce & Co. or their attorneys between 1903 and about three months ago that you were infringing upon their trade-mark rights?

A. I can't remember; I can't remember that.

X Q. 122. Is this the first action for infringement of their trade-mark rights which has been brought against you by Hutchinson, Pierce & Co.?

A. Yes, sir.

X Q. 123. Has Hutchinson, Pierce & Co. known of the use by you and your brother of the representation of a comet upon shirts made and sold by you?

Mr. Cox: That is objected to as calling for testimony beyond the knowledge of the witness.

A. I can't answer that.

X Q. 124. Have you sold shirts to the same parties that
45 Hutchinson, Pierce & Co. have sold shirts?

A. In many cases, yes.

X Q. 125. Were your Comet shirts and the Star shirts of Hutchinson, Pierce & Company on sale in the same stores at the same time?

A. I suppose so, sure. They are yet.

X Q. 126. Have you any doubt about that?

A. No doubt at all; they are yet in many stores.

X Q. 127. Have you seen shirts having upon them the representation of a star exactly like that of Complainant's Exhibit Shirt Label, on shirts in stores and at the same time seen in the same stores other shirts having your comet trade-mark upon the same?

A. Yes, sir.

X Q. 128. How long to your personal knowledge have you either alone or in connection with your brother, and how long has, to your personal knowledge, Hutchinson, Pierce & Co. been putting shirts on the same market marked as indicated in the last question?

A. As to my shirts, since 1872; as to Hutchinson, Pierce & Co., I can't remember that.

X Q. 129. Have Hutchinson, Pierce & Co. for a number of years been placing the representation of a star on shirts in the same market with yours?

A. As far as I remember, yes, sir; I see it on boys' waists, too.

X Q. 130. Have you seen it on dress shirts?

A. I can't remember that; we mind our own business.

X Q. 131. For a number of years you have seen on the market shirts having the representation of a star upon the same not made by yourself, and in the same market have seen shirts manufactured by you or your Company bearing your Comet trade-mark and sold in the same market, and have received no notice that you were infringing prior to 1903; is that correct? The first time you received notice of infringement was in 1903?

A. That is right, the first time.

X Q. 132. Have you secured registration at the United States Patent Office for your Comet trade-mark?

A. Yes, sir.

46 X Q. 133. How recently was this?

Mr. Cox: That is objected to as the certificate should be produced.

A. A few months ago.

Redirect examination by Mr. Cox:

Re-D. Q. 134. You spoke in your cross-examination several times of your trade-mark of the Comet. What was that? What did it look like?

A. A mark like a comet is marked.

Re-D. Q. 135. What is that? Can you describe it?

A. A little star with a tail to it.

Re-D. Q. 136. Was it like the mark that appears on that shirt Exhibit that is there?

A. Yes, some similarity, yes, sir.

Re-D. Q. 137. Well, you say some similarity: What I want to get at is, how did it differ?

A. Well, like it.

Re-D. Q. 138. It was exactly like it, was it?

A. I can't swear to this that it is or that it is exactly like that, unless I am positive it is mine.

Re-D. Q. 139. I understand you don't want to say that is your shirt, but you can tell whether the mark on it is exactly like your mark?

A. Like my mark, yes.

Re-D. Q. 140. It is?

A. Yes, sir.

Re-D. Q. 141. Have you got one of your marks with you?

A. No, I have not.

Re-D. Q. 142. Your brother, I understand, was engaged in the shirt business before you?

A. Yes, sir.

Re-D. Q. 143. And where was he then, where was his business?

A. In the same place, Lispenard street.

By Mr. Fenwick:

X Q. 144. In New York City, you mean?

A. In New York City all the time.

47 By Mr. Cox:

Re-D. Q. 145. You were both in the same place, but the businesses were separate; is that it?

A. Yes, sir.

Re-D. Q. 146. Did you have offices together at that time?

A. Well, we were partners.

Re-D. Q. 147. I mean before that time did you have offices together before you formed the partnership?

A. When I came to this country in 1870, we had offices together, yes, sir.

Re-D. Q. 148. And how long had your brother been engaged in the shirt business before that, do you know?

A. If you will allow me to explain, you know, as I said before, my brother was here five years ahead of me, and he was in the manufacturing of shirt fronts; might be in 1867 and using the trade mark the way as anybody would use any kind of a mark to distinguish his shirt fronts or shirt bosoms from others, and using the mark Comet, the same as you see it here, or similar mark to that.

Re-D. Q. 149. That was before you came to this country?

A. That was before I came to this country, yes.

Re-D. Q. 150. And he was then making shirt fronts?

A. Yes, sir, fronts.

Re-D. Q. 151. What does that mean, he made fronts; sold them to some manufacturers of shirts?

A. At that time, you see, there were not many manufacturers, not as many as there are now, and people used to buy fronts and buy muslin and used to make their own shirts.

Re-D. Q. 152. Yes, I understand your brother made fronts and sold them to manufacturers?

A. No, to store keeps, and manufacturers, yes.

Re-D. Q. 153. The fronts that your brother made were sold to the stores then and not to manufacturers?

A. And manufacturers of shirts; there were some shirt manufacturers at that time, too.

Re-D. Q. 154. And those shirt makers would buy your brother's fronts, as I understand it, and make them into shirts?

A. Yes, sir.

48 Re-D. Q. 155. Did you ever see any of those fronts?

A. Surely. I dealt in them. I dealt in fronts myself.

Re-D. Q. 156. I mean those made by your brother?

A. Sure; you see as my brother was ahead of me, I came with him and he gave me his samples and I went out selling them and through that I seen them.

Re-D. Q. 157. A shirt front, as I understand, is the bosom of the shirt?

A. Exactly.

Re-D. Q. 158. Now, of those you saw manufactured by your brother, where were they marked?

A. Marked—they ain't marked; there is a paper label put on, right in the dozen; there is a dozen tied together, and the label goes in front and marked what number of linen and what lot number and the mark—a little ticket marked Comet.

Re-D. Q. 159. A little ticket; was that paper or woven?

A. Paper ticket; was not woven.

Re-D. Q. 160. On the dozen?

A. Yes.

Re-D. Q. 161. And that was being used before you came to this country, you think?

A. Yes, sir.

Re-D. Q. 162. Then when you first came to this country you acted as salesman for your brother, as I understand?

A. Not quite.

Re-D. Q. 163. Well, what did you do?

A. I was selling for my own account.

Re-D. Q. 164. You did not act at all as your brother's representative?

A. No.

Re-D. Q. 165. You started right in, then, as I understand, manufacturing shirt fronts for yourself?

A. Oh, no. I sold his fronts. He as a brother gave me a chance to make a living and gave me his samples and I sold his fronts for him but for my own account.

Re-D. Q. 166. Oh, I see. The fronts you sold were made by him and sold by you, but for your own account?

A. Yes, sir.

Re-D. Q. 167. Now, when did you first make any fronts yourself?

A. Around in January, 1871.

Re-D. Q. 168. And those fronts that you made were marked how?

49 A. Fancy labels; I didn't use the comet at all.

Re-D. Q. 169. What do you mean by a fancy label?

A. You know, a fancy paper label marked shirt fronts.

Re-D. Q. 170. How—without any mark?

A. Without any mark.

Re-D. Q. 171. And you continued to make shirt fronts and sell them without any mark for how long—until you went in partnership with your brother?

A. Partnership with my brother, yes.

Re-D. Q. 172. And that was in 1876, was it?

A. 1876.

Re-D. Q. 173. Well, now, during that period before 1876, did you make shirts?

A. Yes, sir.

Re-D. Q. 174. And how were they marked?

A. Bunker Hill.

Re-D. Q. 175. Bunker Hill?

A. Yes.

Re-D. Q. 176. And how long did you continue to make the Bunker Hill shirts?

A. Well, until I came with my brother together.

Re-D. Q. 177. Until you went in with him?

A. Yes.

Re-D. Q. 178. And then did you stop making Bunker Hill shirts?

A. Then I stopped making Bunker Hill.

Re-D. Q. 179. When you joined your brother in 1876, did you only make one kind of shirts; that is one name, one brand?

A. One brand.

Re-D. Q. 180. That is all you made?

A. Yes, that is the Comet.

Re-D. Q. 181. You didn't make any for manufacturers?

A. No.

Re-D. Q. 182. And where did you sell them at that time?

A. At that time—New York, New Jersey, Pennsylvania; all around.

Re-D. Q. 183. What do you mean by all around?
A. As far as we could reach.
Re-D. Q. 184. That is what I want to get at: How far did you reach?
50 A. All the States; nearby States, you know; New York State, Jersey, Pennsylvania, Connecticut.
Re-D. Q. 185. About how many people did you employ making the shirts then?
A. At what year?
Re-D. Q. 186. Well, while you were in partnership with your brother, the first part of it, from 1876 on?
A. That varied. We started with one cutter and stopped with six.
Re-D. Q. 187. Started with one and stopped with six?
A. Yes.
Re-D. Q. 188. When you dissolved partnership you had six?
A. Yes.
Re-D. Q. 189. And six cutters means how many people altogether? I suppose there are other people besides?
A. Well, there are helpers; three or four helpers.
Re-D. Q. 190. What was the character of the shirts you made during that period? Were they dress shirts?
A. Yes, sir.
Re-D. Q. 191. Dress shirts and neglige shirts?
A. Yes, sir, mostly white shirts at that time.
Re-D. Q. 192. Did you advertise to the public at that time?
A. Yes, we had a Boston office, and we had a salesman in Chicago, and we had a salesman going around the several States—agents.
Re-D. Q. 193. I mean printed advertisements? Did you issue any of those to the public?
A. I can't remember that.
Re-D. Q. 194. Hasn't it only been within the last four or five years you have advertised in papers?
A. That might be—continuously, yes. We might advertise occasionally, but that continuously only about three or four years.
Re-D. Q. 195. Prior to that it would only be on occasions?
A. On occasions, yes; moving or any other occasion.
Re-D. Q. 196. Notify people of the change of address, or something of that kind?
A. Yes.
Re-D. Q. 197. Your brother and you separated in 1891,
51 I understand, and you then had six cutters: Did you increase that number later on?
A. No.
Re-D. Q. 198. That is as many as you ever had?
A. Yes, sir.

By Mr. FENWICK:

X Q. 199. You mean you only have six cutters now?
A. Not now.

By Mr. Cox:

Re-D. Q. 200. I don't think you understood. I mean since that time have you increased the number of cutters in your employ?

A. I did not; I decreased them.

Re-D. Q. 201. You decreased them?

A. Yes, sir.

Re-D. Q. 202. Well, how many have you now?

A. Three.

Re-D. Q. 203. Well, has the business grown in the last few years?

A. Yes, sir.

Re-D. Q. 204. Well, how do you get along with fewer cutters if you have more business?

A. Machines.

Re-D. Q. 205. Well, how does the business now compare with the business at the time you and your brother separated, in size? Is it much larger now?

A. Not much, no. It is about the same individually. At that time we were two together.

Re-D. Q. 206. That is you have personally twice as much business, because you have your brother's share as well as your own?

A. Yes.

Re-D. Q. 207. But the business as a whole is about the same size?

A. Is about the same, yes.

Re-D. Q. 208. Are you familiar with the shirts made by other people on the market?

A. I know some makes, but I am not familiar with them.

Re-D. Q. 209. Well, mention some of the shirts you know of, please?

A. In which way?

Re-D. Q. 210. By their names, if you know their names?

A. Palmetto shirt is one; Eureka; my brother is using the
52 Giant, and I suppose the Manhattan; next to the Manhattan is the Matteawan.

Re-D. Q. 211. That is an imitation of the Manhattan, is it?

A. That is not an imitation, but I think it is intended for that.

Re-D. Q. 212. Do you remember any of the shirts that were on the market when you first went into the shirt business made by other people?

A. Well I hardly paid attention to it.

Re-D. Q. 213. Don't remember?

A. Don't remember.

Re-D. Q. 214. You have heard of the Star shirt, have you not?

A. Not from that time, I didn't have much to do with it.

Re-D. Q. 215. I mean you have heard of it?

A. Yes.

Re-D. Q. 216. You have known of it for a good many years, haven't you?

A. More Star waists than I know about the shirts. To be honest, I know more about Star waists than I know about their shirt.

Re-D. Q. 217. What shirtwaist do you mean?

A. The Star shirtwaist.

Re-D. Q. 218. Do your duties take you out into the trade to any extent? I mean by the trade, outdoors where shirts are sold to consumers?

A. Not now.

Re-D. Q. 219. Not now?

A. No.

Re-D. Q. 220. Well, have they at any time?

A. I have been travelling myself, selling my own goods for about twenty-five years, and I seen all the other goods.

Re-D. Q. 221. Then you saw all the other goods?

A. Yes, lately, the last eight or ten years.

Re-D. Q. 222. When you were travelling, didn't you frequently encounter the Star shirt?

A. No, I can't remember I paid attention to the Star shirt; a great many others.

Re-D. Q. 223. You saw a great many others, but not the Star, you think?

A. Yes, I remember—I remember the waist; I seen the Star waist, shirtwaist around.

53 Re-D. Q. 224. And you don't remember seeing the Star shirts?

A. No, till I seen them in my son's store.

Re-D. Q. 225. Until you seen them in your son's store?

A. Well, I seen them in my son's store.

Re-D. Q. 226. Was it not the same son that suggested the letter head with the red star?

A. Oh, no, this son has got a store in New York.

Re-D. Q. 227. A different son?

A. A customer of Hutchinson, Pierce & Company.

Re-D. Q. 228. As I understand it, then, you have one son in business with you, and another son that is in business by himself?

A. I have got eight sons, and one has got a retail store on his own account, and about five are with me in the business; five sons.

Re-D. Q. 229. You have preserved the records of the business from the time it was a partnership, have you?

A. Well, some I suppose I did.

Re-D. Q. 230. Have you any old letter heads or bill heads or anything of that kind that would show the trade mark that you used while you were in partnership?

A. I suppose I could; I can't remember that I got them—if I kept them.

Re-D. Q. 231. You think you did?

A. Yes, I think we have some yet with the comet on.

Re-D. Q. 232. Well, would you mind looking for those and if you find them producing them?

A. Yes.

Re-D. Q. 233. You will produce them if you can find anything of that kind?

A. Yes.

Re-D. Q. 234. You spoke on your cross examination of protests on behalf of Hutchinson, Pierce & Co. against your use of the feature

of the mark which consists of a star: Don't you remember those protests were repeated several times between the fall of 1903 and the time this suit began?

A. It might be; but I can't remember.

Re-D. Q. 235. Don't you remember receiving letters of the Messrs. helps & East and also letters from me?

A. No, I can't remember, no. I don't open the letters myself.

Re-D. Q. 236. You don't open the letters?

54 A. Not all the letters.

Re-D. Q. 237. Do you remember whether that advertisement in the Haberdasher in 1903 was the first advertisement you put out for the general public?

A. I don't think it was. We advertised in former years; not quite as heavily.

Re-D. Q. 238. You think the advertising started before 1903?

A. We advertised in some of the directories.

Re-D. Q. 239. In the directories?

A. In the commercial directories; there are several.

Re-D. Q. 240. Can you remember any of those you advertised in?

A. That is very far back; I can't tell.

Re-D. Q. 241. Perhaps you would have records of some of those?

A. No.

Re-D. Q. 242. What do you mean by advertising in the directories; having your name printed in bigger type?

A. Bigger type; that is what I mean.

Re-D. Q. 243. Aside from that kind of advertising, wasn't the advertisement in the Haberdasher the first advertisement or one of the first advertisements you put out?

A. I don't think so, no; we had others.

Re-D. Q. 244. Well, wasn't it about that time you commenced general advertising?

A. Oh, no, long ago. We had a small space first off.

Re-D. Q. 245. That was about the first big space?

A. About, yes; I am not positive; even that I don't attend to. It was one of my sons.

GEORGE S. BROWN, called and sworn as a witness on behalf of the complainant, testified as follows:

Direct examination by Mr. Cox:

Q. 1. Mr. Brown, are you connected with Hutchinson, Pierce & Co., the complainant in this suit?

A. I am.

Q. 2. Are you an officer of that company?

A. I am.

55 Q. 3. What office do you hold?

A. I am president and treasurer.

Q. 4. Hutchinson, Pierce & Co. is a corporation, is it?

A. It is.

Q. 5. How long have you been connected with Hutchinson, Pierce & Co.?

A. Well, you mean Hutchinson, Pierce & Co. and their predecessors, don't you?

Q. 6. Yes. Well, you have been connected with the corporation since it was organized?

A. Oh, yes; I have been connected with the Star shirt and Hutchinson, Pierce & Co. and predecessors ever since November, 1869.

Q. 7. Continuously?

A. Continuously.

Q. 8. Have you knowledge of the fact that Hutchinson, Pierce & Co., of which you are president has registered its trade mark in Washington?

A. I have.

Q. 9. Please look at the certificate I now hand you, marked Complainant's Exhibit Complainant's Registration, and state whether that is the registration of the complainant?

A. It is.

Q. 10. Has that certificate or the trade mark it purports to cover, or any right in either of them been transferred by Hutchinson, Pierce & Co. since its issuance?

A. Not any right of any kind.

Q. 11. It still belongs to the corporation?

A. It still belongs to the corporation.

Q. 12. What is the business of Hutchinson, Pierce & Co.?

A. Manufacturing and selling the Star shirts, Star shirtwaists, Star blouses, Star underwear, and so forth and so forth.

Q. 13. And has that business been uninterruptedly carried on by Hutchinson, Pierce & Co. and its predecessors ever since you were connected with it?

A. It has.

Q. 14. Do you recall how the shirts produced in that business were marked when you first went with the predecessors of the complainant?

A. Why, at that time our shirts were put up in paper packages, with a star on the end of the package, and a star on the top
56 of the package, and this goes back a long ways so that this information I shall have to be a little particular about, giving it to you in this way—that I can't recall whether each shirt was then at that time stamped with a star trade mark, but they were either stamped at that time or within a few months afterwards, because we used the stamp of a star until we adopted the woven label, but as to when I went there in 1869, the Star shirt was recognized on the market all over the country, and we had maintained a house in San Francisco where the Star shirt was equally well known, so that, as far back as that the Star shirt was recognized in the market as the leading shirt of its kind, because the proprietors always maintained their standard.

Q. 15. About when roughly did you substitute a woven label for the stamp, do you remember?

A. Well, I couldn't tell exactly, but it was precisely the same as the star which was stamped on the shirt, except it was woven. Earl & Wilson use their trade-mark with a stamp and not a woven label.

Q. 16. And the woven label which was substituted for the stamp

and identical with it, was a label like that shown in Complainant's Exhibit Shirt Label, was it not?

A. Yes.

Q. 17. When the boxes were adopted for the shirt, how were they labeled or marked?

A. They had a printed label on the end of the boxes with the Star trade-mark thereon.

Q. 18. And was that label like the label marked "Complainant's Exhibit Box Label?"

A. No, because this is a lithographed label and we used in former years a much smaller printed label.

Q. 19. What did the printed label have on it, what did it show?

A. That I couldn't tell you; that is 37 years ago, nearly. I might make a sketch from memory.

Q. 20. Can you state generally what it was?

A. It had a Star trade mark on, a lot number and neck and sleeve length was marked on the label.

57 Q. 21. Did the firm or corporate name appear on the label?

A. It never has.

Q. 22. You are familiar with the labels like the label marked "Complainant's Exhibit Box Label," are you not?

A. Yes, sir.

Q. 23. And they have been used by the complainant and its predecessors?

A. They have.

Q. 24. For about how long should you say?

A. I should say fully twenty-five years.

Q. 25. And prior to these lithographed labels they had the printed labels to which you have referred?

A. Yes.

Q. 26. Has the position and reputation of the Star shirt in the market, to which you have referred, been maintained throughout your connection with the business?

A. It has.

Q. 27. Do you recall that at times the complainant or its predecessors have added to the markings of its boxes or shirts the names of dealers together with the words "made for"?

A. They have, to large customers.

Q. 28. Do the larger number of shirts bear the name of the dealer with the words "made for" or simply the Star shirt with the emblem?

A. Oh, simply the Star shirt. I don't know whether this part of the answer is relevant, but as you have asked the question, I might say that special label business, as it is called, is one we are fast eliminating from our business, so the proportion of shirts that are specially labeled is a very infinitesimal part of our business today.

Q. 29. And in all instances where the special label was added, I understand the words "made for" or equivalent words were used, were they not?

A. Not in all cases, no.

Q. 30. In some cases it would simply have the address of the dealer?

A. In rare cases we would do that.

Q. 31. And in those cases where the special labels were used,
58 they were used in response to requests from dealers for purposes of advertising that dealer was handling the shirts, I suppose?

A. It might be a case where a man advertised himself as a shirt maker and had sometimes placed large orders which helped us in running our factory, and we would make them up for him, put his own label on.

Q. 32. What proportion of the shirts made by you having special labels have also had the Star trade-mark on them?

A. I should think 90 per cent.

Q. 33. You do make some shirts simply for other manufacturers?

A. No, not for other manufacturers.

Q. 34. Other dealers that don't go out as Star shirts at all?

A. We make a very few, and those few we are cutting out as fast as we can so as to avoid the feeling. You can readily understand in a business as old as ours where we have had customers for years and have done a little special work for, we find it very hard to cut them off entirely at once, and have therefore continued in a small way doing this special labeling business.

Q. 35. Where have the Star shirts of complainant and predecessors been sold during your connection with the business?

A. All over the United States, and Sandwich Islands, a few in South America, Australia, Japan and Canada.

Q. 36. And by all over the United States you mean in all the principal cities?

A. I do.

Q. 37. And can you give us some idea how largely they have been sold by comparing them with the sales of other shirts or otherwise?

A. I don't see how I could possibly give you that. I know nothing positive about the volume of business of other shirt concerns any more than they do about ours.

Q. 38. Well, the Star shirt is recognized and has always been as one of the leading shirts on the market?

A. Decidedly. It was so recognized back in 1869, as I told you before. It certainly has not lost any of its prestige since that time.

Q. 39. Have you heard or been informed concerning the manufacture and sale of shirts by the defendant herein bearing a
59 mark illustrated by the shirt which I hand you marked Defendant's Shirt?

A. I have.

Q. 40. When did you first hear of the use of that mark?

A. I don't think I could give you the exact date, but it was my impression it was marked on the first advertisement I saw.

Q. 41. Will you kindly look at the advertisement I hand you marked Complainant's Exhibit Defendant's Advertisement, and state whether that is the advertisement to which you referred?

A. Yes.

Q. 42. Do you recall about when you saw that advertisement?

A. The date is right on here, October, 1903.

Q. 43. That was the first knowledge or intimation you had of the use of such mark by the defendant?

A. As far as I can remember.

Q. 44. Upon having your attention directed to that, what did you do?

A. Mr. Pierce was president at that time and he took the matter up, as I remember, with Messrs. Phelps & East, who conducted some correspondence.

Mr. MORRILL: I object to the testimony as hearsay.

Q. 45. Can you state whether the owners of the complainant's business during the period that you have been connected with them, that is since 1869, have taken steps to prevent the use of the representation of a Star on shirts by others?

A. I can.

Q. 46. What have they done in that direction, roughly speaking. I don't care to go into details?

A. Well, as far as my memory recalls, I should think we have had at least 12 to 18 suits within that time, which have all been decided in our favor.

Mr. MORRILL: I object to the testimony; the records of the Court are the best evidence.

A. (Continuing:) We have notified a great many in-
60 fringers by mail and they have desisted and we have their letters on file in many cases.

Q. 47. Have you in every instance where you learned of the use of a star on shirts by others taken action to correct it promptly?

A. I believe we have. Of course, it is very difficult for me to go back thirty-seven or eight years when I was only a young boy there and tell you here without going over our records of the old firm to see. It has been the purpose of our house and continuous aim to protect their trade mark and so long as I could remember they have done so.

Q. 48. You know, since you have been concerned in the active management of the business you have always promptly corrected any infringement?

A. Yes, we have.

Q. 49. And you know of no instance except that before us of the defendant, where the star has been used without being stopped by legal proceedings taken by you?

A. No.

Cross-examination by Mr. MORRILL:

X Q. 50. Mr. Brown I believe the customary preliminary question as to your age was omitted: Will you please state it?

A. I was born September 13, 1856.

X Q. 51. Then at 1869 you were 13 years old?

A. I was.

X Q. 52. Now, in regard to these special order shirts that you make for dealers, they furnish their own labels, do they?

A. Yes.

X Q. 53. And those labels contain whatever wording they see fit together with this representation of a Star?

A. No, not whatever wording they see fit.

X Q. 54. Well, all right.

A. We certainly wouldn't permit anything to go on our shirts that would affect our own trade mark.

X Q. 55. It consists then of the representation of this star together with their name?

61 A. It would be something like this trade mark: Star made for Rogers, Peet & Company, New York.

X Q. 56. You stated a little while ago it did not always contain the words "made for"?

A. No. I think you are in error. The question was asked me as to whether we sometimes put on labels leaving off our trade mark, and in reply to that I stated we do occasionally, a very small percentage of our business for some old customers; that is my answer to that.

X Q. 57. Do you not put on labels for people who represent themselves to the trade as manufacturers and who are really not manufacturers—labels bearing their name with the representation of a star without the words "made for"?

A. In other words, do we put our Star trade mark on for a man who represents himself as a manufacturer?

X Q. 58. That was the question?

A. Emphatically no.

Adjourned to Friday, October 19, 1906, at 1 P. M.

NEW YORK, *October* 19, 1906.

Met pursuant to adjournment.

Present: Counsel as before.

JOSEPH LOEWY, recalled.

By Mr. Cox:

Q. 1. Mr. Loewy, did you succeed in finding anything showing the use of the comet in the early days?

A. I did not.

Q. 2. Did you find any papers or other matter relating to the business in the early days of it; that is prior to say 1890?

A. Oh, my, yes. I wrote for a bill and I will get it, maybe tomorrow.

62 By Mr. MORRILL:

Q. 3. He asked if you found anything?

A. I didn't find anything. Whatever I did find had no date on it.

By Mr. Cox:

Q. 4. Did you find any papers relating to the business that were dated prior to the last three or four years, of any kind?

A. What paper do you want?

Q. 5. I want to know if you found any kind?
A. No, I didn't look for them. I looked for the other papers.
Q. 6. What other papers?
A. I mean the bill heads.
Q. 7. Well, did you find any bill heads dated more than two or three years ago?
A. I find them in my customers' places.
Q. 8. You did find them?
A. I did find them in my customers' places, but I ain't got them here yet.
Q. 9. Oh, they will be here?
A. Yes.
Q. 10. Did you look through the records of your business for old bill heads or letter heads or labels?
A. They are not dated.
Q. 11. Did you look?
A. Sure I did, but they are not dated.
Q. 12. Well, did you find any old ones of any kind?
A. They are the same way as we got them now.
Q. 13. What way; you didn't seem to know yesterday?
A. The labels, the Comet.
Q. 14. You didn't find anything that was dated?
A. Nothing dated, no. We don't date any of those things.
Q. 15. Well, wasn't there anything dated. Not necessarily a bill. Didn't you have old letter heads, for instance, with the figures "189" that were used during the nineties or something of that kind?
A. Yes. I can find a whole lot of them. I looked for 1870.
Q. 16. You didn't look for any kind except the '70s?
A. Yes, sir.
63 Q. 17. Did you find anything in the '70s at all?
A. I found my own start, when I started in business.
Q. 18. That was what?
A. Well, I got a business card and I found a statement.
Q. 19. Did those have on them any mark?
A. The statement was marked 1873, and the bill head is marked—it is 187 and the blank.
Q. 20. Well, did they have any trade mark on them?
A. They had my trade mark, yes, sir.
Q. 21. What was that?
A. That was the Bunker Hill.
Q. 22. But you didn't find any with the name Comet?
A. I didn't use the comet at that time.
Q. 23. Well, I mean you didn't find any in the business?
A. I didn't look not as far back as that.
Q. 24. Well, what was the earliest one you found with the word Comet on it? Did you find any with the word "Comet"?
A. I had none.
Q. 25. Didn't find any?
A. I didn't find any. I had none at my disposal; you can't have any if you want them.
Q. 26. Well, if you have kept the papers which show the use of

the name Bunker Hill, you must have similar papers showing the use of the name Comet if you used it, haven't you?

A. I suppose so, sure.

Q. 27. Well, why can't you find those them?

A. I didn't look so far; they were not in my possession. Comet was not in my possession; it was in my brother's possession.

Q. 28. Well, you have all the papers of the business since it became a firm, anyway?

A. Yes.

Q. 29. Well, they are in your possession, aren't they?

A. We destroyed or sold all the old paper when we moved from 50 Lispenard street to 594 Broadway.

Q. 30. You destroyed all the old papers?

A. We destroyed all the old papers, yes, sir.

Q. 31. Well, what was the use of looking for them yesterday?

A. I looked in my private desk in my residence; I thought I might find some one dated back.

64 Q. 32. Then you didn't look down at the place of business?

A. In business I couldn't find them at all, because they were sold or destroyed, sold to the paper man.

Q. 33. And that was when? When was it they were destroyed?

A. It will be in February three years.

Q. 34. You destroyed them three years ago?

A. About, yes. I didn't look for any of later dates. I looked only for the old ones, and the old ones were destroyed.

Q. 35. Well, what was it you destroyed, up to when?

A. A few cases of old paper we couldn't move along.

Q. 36. Well, do I understand you destroyed some and didn't destroy others?

A. Oh, we kept some, you see. I think I can give you some in the '80's or above 1880. I kept some.

Q. 37. Did you keep all the papers after any particular date?

A. Well, about two or three years we kept papers back, about two or three years; that would be about six years.

Q. 38. You kept them running back for about six years ago?

A. Yes, about.

Q. 39. That is, six years from now?

A. That is six years from now, back there now.

Q. 40. And you destroyed all those prior to that time?

A. Not destroyed them; we sold them.

Q. 41. Well, sold them to be destroyed?

A. Yes.

Q. 42. Well, then, there is nothing in existence, so far as you know in your business that dates back of six years ago?

A. Oh, yes, lots of things.

Q. 43. Well, what?

A. Oh, I can give you any papers you desire. Six years back I can give you any paper you desire.

Q. 44. Oh, I mean before that?

A. Before, no.

Q. 45. Everything in any way connected with the business prior to June, 1900, was destroyed?

A. Yes, 1887, might be 1888.

Q. 46. Well, did you look for any copies of the old labels?

65 A. We had none. We had always the same. The copy of the label to-day is the same as it has been before.

Q. 47. Well, did you look for any of the old labels?

A. There would be no date on them.

Q. 48. What?

A. The labels have no date.

Q. 49. Well, do you mean it wasn't worth while to look, or you didn't look or what?

A. I didn't look for labels exactly, but at the same time there would be no date on the labels; I couldn't tell if they are 10 or 15 or 20 years old; I couldn't tell; there is no date printed on them.

Q. 50. I understand that at one time you used papers that went around the dozen shirts: You don't use those any more, do you?

A. They used to be shirt fronts.

Q. 51. Shirt fronts?

A. Yes, not shirts.

Q. 52. You never used those around shirts?

A. Sometimes around fancy shirts.

Q. 53. Well, did you look for any of those?

A. I didn't look for them, no. I know I didn't have any in 1870; I didn't have them then.

Q. 54. I understand that all that you found in your search through your papers were some old papers relating to the trade mark Bunker Hill?

A. Oh, no. I can find for you more than a man can carry.

Q. 55. But I thought all your papers were destroyed up to 1900?

A. I know, but since that time.

Q. 56. Oh, you can find plenty since that time?

A. Sure.

Q. 57. But the only thing you found prior to that time were papers relating to Bunker Hill?

A. That is what I looked for. I looked for papers of 1870. I didn't look for any paper in 1880 or 1890.

Q. 58. Well, are there any papers of 1880 or 1890. Can you look for them?

A. I suppose there are some cases some customers kept the bills up, and I might be able to supply you with some.

Q. 59. Well, do you think those bills would show the trade-mark?

A. That is what it is—I hardly think so.

66 Q. 60. You don't think they would?

A. I hardly think so.

Q. 61. Do you know whether you put the trade-mark on your bills now?

A. Now we put it on, yes, sir.

Q. 62. You do it now?

A. For the last ten or twelve years.

Q. 63. Well, then, you ought to be able to find some that are ten years old or so that have the trade-mark shown?

A. Oh, yes, I think I could.

Q. 64. Well, now, do your bills now have the picture of the star with the tail to it as well as the word or just the word?

A. The picture and the word.

Q. 65. They have both?

A. Yes.

Q. 66. Do they have the word "Bonton" on them?

A. Not now, no.

Q. 67. Well, did they ever have "Bonton" on them?

A. Yes, sir.

Q. 68. When was that?

A. When we made the better grade; that is about a few years ago. Might be two or three years ago. We made Bonton and Comet; took the Bonton for the better class and the comet for the Comet shirt.

Q. 69. And how long did you make the Bonton; how many years back did that go?

A. That is only a few years.

Q. 70. Only went back a few years?

A. Only went back a few years.

Q. 71. And while you were making both the Bonton and the Comet, the letter heads and advertisements were like those you were shown yesterday, the Bonton on one side and the Comet on the other, and the Star with the tail to it in the center?

A. Yes, sir.

Q. 72. Do you think you can remember the label that was used on the bundles of shirt fronts while the partnership between you and your brother existed?

A. I can remember well, yes.

Q. 73. Remember what it looked like?

A. Yes.

Q. 74. What color was it?

A. The labels have been blue.

67 Q. 75. They were blue?

A. Yes, sir.

Q. 76. You mean solid blue background?

A. The label itself was first blue and the comet had a different blue. It was a kind of an abstract. Only a little bit of a mark similar to this shirt mark.

Q. 77. You mean that the whole label was in two shades of blue?

A. Yes, sir.

Q. 78. No other color on it?

A. And white.

Q. 79. Oh, and white?

A. Yes.

Q. 80. What part was white, the background?

A. The background was white, yes. The part in front was white too, where the pressing came out.

Q. 81. Where did the two shades of blue come in: What was printed in two shades of blue?

A. The words "shirt fronts" and then there was a little blank left to put in the number and quality.

Q. 82. Well, do you mean that some of that was in one shade of blue and the rest of it in another shade of blue?

Mr. MORRILL: I object to the question on the ground that the direct testimony of this witness is closed and that the testimony is not the proper subject matter for re-direct.

A. They might be. I am not positive over that. I am not quite positive.

Q. 83. Well, is that all that was on the labels?

Same objection.

A. Yes, sir.

Q. 84. Didn't the word "Comet" appear on them?

A. In figure only.

Q. 85. Only the figure?

Same objection.

A. Yes.

68 Q. 86. And that figure was the star with the tail to it?

Same objection.

A. Yes, sir.

Mr. MORRILL: You may note that the same objections apply to each question and answer without being repeated.

Q. 87. Well, now, about when do you think they first put the word "Comet" on in connection with the figure?

A. I can't remember that; it is too far back.

Q. 88. Are you sure that that figure when the word did not appear had a tail to it?

A. Yes, sir. I suppose so.

Q. 89. Sure it always had the tail?

A. Yes.

Q. 90. Do I understand that since the Bonton was given up the only shirts you have made are the Comet?

A. We use that name, the label Comet only.

Q. 91. On all of them?

A. Yes, sir.

Q. 92. And those were the only ones you made?

A. Just now, yes, but we still have the Bonton; we still continue the Bonton.

Q. 93. Oh, you still?

A. Oh, yes.

Q. 94. Well, I am not sure I understand that: Do you mean you use the name Comet on the Bonton shirts too?

A. As I expressed before, we use the Bonton on the better or a higher grade goods and the comet on the cheaper grade.

Q. 95. Well, then, you make both Bonton and Comet still?

A. We do not; we use mostly now Comet.

Q. 96. Well, I don't get it straight. What I would like to know is whether Comet is the only kind of shirts you make now?
A. We use that word Comet just now, yes.
Q. 97. Is that the only kind?
A. Just now, yes.
Q. 98. Well, do you mean by "just now," today or what?
A. What I mean by it, any time we feel like using Bonton
69 we put on Bonton again. We have got Bonton and Comet on our sign and we are advertising under that name, too.
Q. 99. Oh, you advertise in both, but just at present you are not making Bonton?
A. Yes.

Cross-examination by Mr. MORRILL:

X Q. 100. In your re-direct testimony just now you testified that on your bill heads or letter heads, I don't remember which, you said the name- Bonton and Comet both appear together with the symbol of a Comet; is that right?
A. Yes, sir.
X Q. 101. Do those two names ever appear together on a garment?
A. No.

70 NEW YORK, *February* 14, 1907.

Met pursuant to notice.
Present: Mr. Cox and Mr. Phelps, for complainant, Mr. Morrill, for defendant.

ANTHONY MCTIERNAN, called and sworn as a witness on behalf of the complainant, testified as follows:

Direct examination by Mr. COX:

Q. 1. Where do you live?
A. I live 504 West 151st street.
Q. 2. In what business are you now engaged?
A. I am with Hutchinson, Pierce & Co.
Q. 3. How long have you been connected with the particular business carried on by Hutchinson, Pierce & Co.?
A. Since 1859.
Q. 4. Continuously?
A. Yes, sir.
Q. 5. During that time has the business been carried on under the name of Hutchinson, Pierce & Co.?
A. No, not to begin with. T. A. Morison & Hoyt it was first.
Q. 6. And do you remember who succeeded the firm of T. A. Morison & Hoyt in the ownership of the business?
A. Morison Son & Hoyt, I believe.
Q. 7. You remember at any rate that it has been the same business during the time you went with it.
A. Yes, sir.
Q. 8. Simply carried on under these different names?
A. Yes, sir.

Q. 9. You speak of the firm of Morison Son & Hutchinson: Do you remember whether they were conducting the business now conducted by Hutchinson Pierce & Company, about the year 1872?

A. I couldn't place the year, but when the firm changed they continued on the same principles and the same business.

Q. 10. And it was about that time that they conducted it as far as you remember?

A. As close as I remember; I couldn't place the date, but
71 as close as I recollect it was them years.

Q. 11. What have been your duties in the business; that is to say what have you done from day to day?

A. Well, I have got out these goods and then packed them and marked them occasionally, where they were going to; put a ticket on them; shipment ticket; took the goods off the shelf.

Q. 12. From the order?

A. From the order; I would take hold of it and get out the goods.

Q. 13. Whatever the order called for?

A. Whatever the order called for, and then they would be charged up and later on I probably packed them.

Q. 14. In that way have you been continuously familiar with the goods since 1859?

A. Yes, sir.

Q. 15. Do you remember that when you went with the business in 1859, among the goods sold were shirts?

A. Yes, sir.

Q. 16. Do you remember how the shirts were marked at that time?

A. Were marked with a Star and put in paper wrappers; wrapped up in paper instead of boxes as it is now, but the star was the same as at the present time.

Q. 17. And was the star printed on the paper wrapper as well as on the shirt at that time, if you remember?

A. To the best of my knowledge it was, but that was so long ago I had so little reason to keep track of it, it went out of my mind, of course.

Q. 18. You remember it was printed on the shirts anyway?

A. Yes, sir.

Q. 19. And has the star been continuously printed on the shirts to your knowledge since then?

A. Yes, sir.

Q. 20. When you went with the business in 1859, if that was the date, did you see a considerable number of shirts bearing the symbol of a star shipped every day?

A. Yes, sir.

Q. 21. Can you give me any idea of the extent of the business at that time?

A. Well, they had a large business then; they had a large amount of Southern trade and shipped considerable to the south,
72 previous to the war; had a big trade, a large trade scattered around; very large shipping trade to the South those days.

Q. 22. And the business has continued to be of large proportions since that time?

A. Large proportion and increasing as it came along in later years up to the present date.

Q. 23. Have you in the course of your duties had occasion to note the manner in which the shirts purchased in that business have been ordered?

A. Been ordered?

Q. 24. Yes.

A. That is by the trade that ordered them?

Q. 25. Yes; that is by what name if any they are ordered?

A. They occasionally as I recollect the time, they would come as the Star shirt—Star shirt recommended; just to the firm address, whatever the number of the firm was then, and I have seen several letters come as Star shirt coming then as today, to this concern today; that is direct from out of town. For instance, you take a western house or any place, they don't put the name today, but say only the Star shirts and it will reach this concern.

Q. 26. You mean by that, if I understand you, that the letters containing orders—that is envelopes have been addressed Star Shirt Company, New York?

A. Occasionally; not as a general rule, but I have seen them come addressed to the Star Shirt.

Q. 27. Without the name of the firm?

A. Without the name of the firm, yes, sir.

Q. 28. And the orders themselves inside the envelopes spoke of the shirts in what way?

A. Well, occasionally it would give it on the same heading; that is Star shirt; send me so and so of the Star shirts, the name, what quality and the size.

Q. 29. The shirts sold in the business with which you are connected have been marked by the figure of a Star as you have already testified; have they had in addition to that the name of the firm that manufactures them stamped on them?

73 A. Not on the shirt, no, sir.

Q. 30. Has the name of the manufacturer been on the pasteboard boxes in which they are packed?

A. Not on the pasteboard box; on the head line of the bills; not on the boxes.

Q. 31. The boxes themselves have simply borne the Star?

A. Borne the Star, yes, sir.

Q. 32. And that has been continuously so ever since you have been in the business?

A. Yes, sir.

Q. 33. When you went with the business in 1859, it was an established business, was it not; it wasn't just starting?

A. No, sir.

Q. 34. It was an established business?

A. Yes, sir. They were already in for some years previous to that.

Cross-examination by Mr. MORRILL:

X Q. 35. You say that you commenced with the predecessor of this firm in 1859?

A. Yes, sir.

X Q. 36. Where did you live at that time?

A. I couldn't say, sir; I boarded; I was boarding then; I couldn't place in what place; I changed around occasionally as you know a man will in those days and had been boarding in different places—let me see——

X Q. 37. I wish you would name the various firms that have had this business that you have testified to starting in with the firm that had the business at the time you went to work for them down to the present time?

A. Well, of course my recollection—you know I have been with the house for so many years and of course I took no notice what years it was; one of the concerns were simply T. A. Morison & Hoyt to begin with, and then later on, Morison Son & Hoyt, Morison Son & Hutchinson; then Hutchinson, Pierce & Company. You see I can't place it; there might be a little change, but that is the changes they made, may have been made different, but the same concern, only simply that at the time the old gentleman took his son in; I can't place how it read. I didn't take any notice to it; that is can't keep track of it in fact.

74 X Q. 38. Which firm name succeeded T. A. Morison & Hoyt?

A. Morison Son & Hoyt as close as I recollect.

X Q. 39. At what time did they succeed them?

A. Oh, that I couldn't place, the year. I couldn't place the year. I couldn't give that.

X Q. 40. Did you work for Morison, Son & Hoyt?

A. Yes, sir.

X Q. 41. Where were you living at that time when you worked for Morison Son & Hoyt?

A. I was living in New York, boarding.

X Q. 42. Whereabouts in New York?

A. I boarded several places.

X Q. 43. Well, but where were you boarding, I am trying to find out what kind of a memory you have got?

A. I have got a good memory, but on matters of that kind they have passed out many years. I boarded in Wooster street, one place.

X Q. 44. How long ago was that?

A. That is in the neighborhood I should think probably—I can't place the year exactly; I couldn't place the year.

X Q. 45. How old a man are you?

A. 67.

X Q. 46. How old were you when you went to word for T. A. Morison & Hoyt?

A. That I couldn't tell you, sir. I came to this country a boy and I had not as clear a record of my age.

X Q. 47. How old do you think you were at the time you went to work for them?

A. Well, by giving my age now what it is— I am not much at figuring as to the years I have been there.

X Q. 48. I don't ask for that. I want you to tell from your memory how old you were when you went to work for these people?

A. I couldn't place the year.

X Q. 49. You can't remember that?

A. If I thought the matter over previous to coming here I could, thought the matter over to say that; I couldn't get at the very year.

X Q. 50. You have thought over the matter of the trade

75 mark, I suppose?

A. It wasn't necessary at all.

X Q. 51. That wasn't necessary?

A. No, sir; that I have got clear in my head.

X Q. 52. How old were you when you came to this country?

A. That is one of the remarks I made to you that I couldn't place a few minutes ago; I have no recollection of my exact age.

X Q. 53. Then when you say you are 67 years old you are simply guessing at it?

A. No.

X Q. 54. You know you are 67?

A. I know I am 67.

X Q. 55. How did you find that out if you don't have any record of your age when you came here?

A. That I have taken from the best of my knowledge; one of my friends told me, and I have taken out some insurance, and in order to be exact as I could I thought as close as I could.

X Q. 56. Were you 20 years old when you went to work for them?

A. I presume I was about that probably.

X Q. 57. You presume you were about that?

A. I would not give the very exact age.

X Q. 58. Well, judging from your size?

A. Judging by my size I was that. I was a strong and healthy boy and I recollect of the duties I had to do. I was strong enough to do it, and just a strong boy, but what exactly my age was, I couldn't say.

X Q. 59. Do you know if you are 67 years old and went to work for these people in 1849, you were only nine years old?

Mr. Cox: I object to that as misleading.

A. I didn't say in 1849, did I.

X Q. 60. That is my recollection of it, what was it? What is the date?

A. 1859.

X Q. 61. What firm succeeded Morison Son & Hoyt?

A. Morison Son & Hutchinson.

X Q. 62. Did you work for that firm?

A. Yes, sir.

76 X Q. 63. Where did you live at that time?

A. The closest where I could place that is where I used to go to lunch.

X Q. 64. I don't care where you lunched. I want to know where you lived?

A. I lived in Pearl street; corner of Frankfort and Pearl.

X Q. 65. Did you live there all the time that the firm was Morison Son & Hutchinson?

A. That I couldn't tell you; I couldn't tell you that. I occasionally moved around, not very often, but I recollect of my going to lunch there down the street, and the way I went was as close as I recollect that placed it I boarded there at that time.

X Q. 66. How many years was the firm Morison Son — Hutchinson?

A. That I couldn't place. I kept no track of that, and of course I had no notice to it; no record of it at all.

X Q. 67. But you can remember the Star brand, can you?

A. I can remember going there, the Star brand and working for the Star, for each of the concerns as they made the change; it was immaterial to me who came in; it didn't make any difference to me, but what year and what parties was into it, it didn't made any difference, so I couldn't place the year they made the change.

X Q. 68. You have got a pretty good memory on one point?

A. I have got a fair memory on almost everything as close as I think myself; that is to say I have got a good memory; there is nothing the matter with my memory; I have no object in telling any statement only what is exactly so.

X Q. 69. You are still working for the firm, aren't you?

A. Yes, sir; I have no object in telling any matter only what is just right as it happens.

X Q. 70. You say that in 1859 the goods were marked with a Star?

A. Yes, sir.

X Q. 71. What kind of a Star were they marked with?

A. Same size star as they are marked with to-day.

X Q. 72. I want you to describe the star?

A. Six pointed star.

77 X Q. 73 What were the characteristics; describe the Star.

A. I can draw you—

X Q. 74. No, just describe it?

A. I can't; a six pointed star; I will show you about the size.

X Q. 75. I don't care anything about the size; simply describe the star just in words. Tell me what sort of a star it was?

A. I am satisfied to prove the star was then as it is to-day, and about that size you know. We have it in the book there to show, and I am satisfied to prove that is the same star and about the same size.

X Q. 76. Was it a solid star or was it made with simply a mark around the outside?

A. It was a solid star made on the shirt; printed on the shirt.

X Q. 77. Solid star?

A. What do you call a solid star?

X Q. 78. Was the star one color all over or was it simply made one star around the outside?

A. It was one color; the star is one color.

X Q. 79. All over?

A. Star shirt; whether the star differed in size or not, then, of course, that I couldn't tell. It was never necessary for me to know.

X Q. 80. Didn't you say if you tried to remember what the star looked like before you couldn't do it?

A. It was a star then as it is now.

X Q. 81. But you can't remember what it looked like then?

A. Simply that it was a star.

X Q. 82 (X Q. 81 repeated.) A.Yes, sir.

X Q. 83. And it was the same star you use now?

A. The same star we use now.

X Q. 84. I hand you Complainant's Exhibit Shirt Label and ask you if your trade mark Star looked like that in 1859?

A. I would not think so.

X Q. 85. You wouldn't think so?

A. No.

X Q. 86. (Turning exhibit over.) Did it look like that?

A. Mightn't have been as red as that, but the same description of a star.

X Q. 87. Same description of a star?

A. Yes, sir.

X Q. 88. Would you call that the same color, solid all over, or simply a mark around outside?

A. You mean red color.

78 X Q. 89. That star?

A. I would call that red color.

X Q. 90. Same color all over?

A. Not the same as that; that material it is made on.

X Q. 91. I am talking about the star; is that star red all over or is it a mark around the outside?

A. I don't understand what you mean, red all over. It is the same star; the star is just the same all around as far as I can see.

X Q. 92. The same star that was used in 1859?

A. Yes, sir.

X Q. 93. I hand you Complainant's Exhibit Box Label and ask you if the star that is shown there is the same as used in 1859?

A. That star is in a larger form, but it is the same, but in a larger form on the label; it is the same star.

X Q. 94. You testified that before the war the firm had a large trade in the south?

A. Yes, sir.

X Q. 95. And some scattering trade through parts of the country?

A. Oh, yes, sir.

X Q. 96. Did the beginning of the war stop the Southern trade?

A. Yes, sir; that is at the time of the blockade; previous to the blockade this concern sent a great many goods down to their customers thinking as a great many others did that the war wouldn't amount to any war; they sent a number of their goods down to these customers and provided them for the time being as they supposed, that it would only simply be no war at all. Then as soon as the blockade came, of course they stopped sending any more goods.

X Q. 97. Did the firm after the war have a large trade in the South?

A. Oh, yes, later on, yes, sir. Yes, they have had a very large trade; salesmen travelled there and they had a large tarde there.

X Q. 98. Immediately following the war did they have a large trade in the South?

A. Well, as soon as the war was settled they picked up the trade a good deal there, for their shirts were known there, and there was a great many people that was alive then would use nothing
79 else only the Star. There is a concern today, a gentleman named Mr. Levy that had been down south then. He was then in the business of L. P. Levy & Company, Mobile, Alabama, and he was up in New York today, and he told all his friends after the war to use the Star, and to do whatever they could to build it up, for it was the only first class article that there was. My statement is simply straighforward; of course, I cannot place it, but it is a straightforward thing; just simply to tell what I know.

X Q. 99. Have you ever since 1859 been doing as you say taking the goods fro mthe shelf and then packing them?

A. Yes, sir; I have been taking goods from the shelf and after they were charged probably to unpack.

X Q. 100. Have you done all that work that has been done?

A. No, sir; there have been other parties. I couldn't get them out and ship them.

X Q. 101. How did the business of the firm in 1859 compare with the business of the firm now?

A. Well, to my knowledge there wasn't such a variety of goods, but they have had a fine grade of goods and were doing a large business then; not so many qualities. There were only a few lots, chiefly white shirts then, as close as I recollect; not so many negligees as used today.

X Q. 102. How about the volume of the business; did they have as big a business then as they do now?

A. No, I don't think so; no, oh, no, but they were considered the leading house in that line of business in the City of New York.

X Q. 103. Has this firm ever used any other form of star than the one shown on this label—any other form, now?

A. Not to my knowledge.

X Q. 104. Have they ever used one made up in any other way? I am not talking about size now, but any different design?

A. No, sir: that is the only star they ever made up, to my knowledge. I would know pretty well if they did. I would see it on their goods.

80 BARRY C. DAVIDSON, called and sworn as a witness on behalf of the complainant, testified as follows:

Direct examination by Mr. Cox:

Q. 1. Please state your name, age, residence and occupation?

A. Harry C. Davidson; 20 West 25th street; 37 years; salesman for Hutchinson, Pierce & Company.

Q. 2. What is the business of Hutchison, Pierce & Company to whom you refer?

A. What do you mean, what is their business?

Q. 3. What do they do?

A. Manufacture shirts.

Q. 4. When did you become associated first with that business?

A. 1890.

Q. 5. Under what name was the business then carried on?

A. Hutchison, Pierce & Company.

Q. 6. Do you know whether it was then incorporated under that name or not?

A. It wasn't incorporated then, no, sir.

Q. 7. At that time it was a firm, was it?

A. Yes, sir, Mr. Hutchinson and Mr. Pierce were both alive.

Q. 8. Do you remember when it was incorporated?

A. No, I do not. I remember about the time.

Q. 9. It has been the same business, however, ever since you have been connected with it?

A. Yes, just the same.

Q. 10. Prior to your connection with Hutchinson, Pierce & Company, were you engaged in any employment which brought you into contact with the goods?

A. Yes, sir.

Q. 11. Sold by that company—made by that company?

A. Yes, sir, I was four or five years, I don't remember which, with Wechsler & Abraham of Brooklyn, now Abraham & Straus, in the men's furnishing department, and they handled the Star shirt there.

Q. 12. And they are a large department store of Brooklyn?

A. Very large.

Q. 13. And did they handle the Star shirts?

A. Yes, exclusively, practically.

81 Q. 14. All the time you were connected with them?

A. All the time; customers would come in and ask for Star shirts.

Q. 15. Since you have been connected with Hutchinson, Pierce & Company, what have been your duties; won't you state fully what you do?

A. I travelled on the road and sold all the goods I can.

Q. 16. And where have you travelled for Hutchinson, Pierce & Company?

A. Well, I have travelled—my regular trip was formerly New England and the Middle West; then at different times when other men have been ill, I have covered the entire South, most of the south; then I took care of the coast for five or six years; so I have covered the whole country for them.

Q. 17. You refer to the Pacific coast?

A. Yes, Pacific coast.

Q. 18. You say while you were connected with the firm of Abraham & Straus, customers would come in and ask for Star skirts; was that a frequent occurrence?

A. Oh, yes, very.

Q. 19. And that was the way that the shirts you sold there were bought and sold, was it, by that name?

A. Yes, all marked in those days with the same red star you see there.

Q. 20. This same red star that appears on the Exhibit Shirt Label?

A. Yes, we have men's shirts, boy's shirts and boys' waists.

Q. 21. And a variety of styles of each, I suppose?

A. Yes, all marked with that mark; sewed on.

Q. 22. According to your experience in travelling how have the shirts been known and sold?

A. The Star shirt.

Q. 23. Have you ever during all your experience encountered any shirt not made in the business now owned by Hutchinson, Pierce & Company bearing the figure of a star with the exception of those of the defendant in this case?

A. No; I have never seen any.

Q. 24. What position, according to your experience, has
82 the Star shirt held in the trade during your experience?

A. First class.

Q. 25. Has it been the leading shirt?

A. That is pretty hard to say; it has been one of the leading shirts; of course, I think it is the leading shirt; but I know it was one of the leading shirts.

Q. 26. Can you mention some of the other leading shirts which you have encountered on the market?

A. Yes, the Manhattan shirt and the Monarch—those are about the only shirts that amount to anything that are sold under trade marks. Really there is only one other that amounts to anything. Take the Monarch shirt, they have two trade marks; I would say there are only two first class houses, that is the Star shirt and the Manhattan shirt, that use emblems or trade marks.

Q. 27. The others use the firm name?

A. Well, they do, yes, to a certain extent. There are some houses that use emblems or so forth or words to act as a trade-mark, don't you know, but the two leading makes I think which are recognized by the trade are the Star shirts and the Manhattan shirts.

Q. 28. And that has been so throughout your experience?

A. Always, yes, sir.

No cross-examination.

GEORGE STITT BROWN, recalled:

Direct examination by Mr. COX:

Q. 1. Mr. Brown, you have already testified in this case, I believe, have you not?

A. I have.

Q. 2. And you stated among other things that you have been with the business now carried on by the corporation of which you are president since 1869, as I recall it, did you not?

A. I have, yes.

83 Q. 3. Will you kindly state, if you know, the names of the various firms or corporations which have owned and conducted the business since you have been connected with it?

A. When I went with them the firm was then Morison Son & Hutchinson; it after became Morison & Hutchinson; then it became Hutchinson, Pierce & Company, a firm, and afterwards Hutchinson,

Pierce & Company, an incorporation. I have simply stated the various titles of the organization since I have been connected with it. I don't suppose you care to hear what went before; that, of course, I could tell you from what I have been told.

Q. 4. Do you recall whether the firm of Hutchinson, Pierce & Company was composed of Gardiner S. Hutchinson, Henry B. Pierce, Ira Cole and Thomas S. Morison?

Mr. MORRILL: Question objected to as leading.

A. I do.

Q. 5. Do you recall who the firm of Morrison Son & Hutchinson was composed of?

A. I do.

Q. 6. Who were they—who were the partners?

A. Thomas A. Morrison, Thomas H. Morrison, and Gardiner S. Hutchinson.

Mr. COX: Complainant's counsel offers in evidence certified copy of a decree of the United States Circuit Court for the District of Connecticut in Morison Son & Hutchinson vs. Case & Rathbun, made and entered in the April term, 1872, and also a certified copy of the decree of the Circuit Court of the United States for the Northern District of Illinois, Northern Division in the case of Hutchinson, *et al.*, vs. Blumberg, made and entered June 11, 1892.

Mr. MORRILL: Counsel for defendant objects to the receipt of the offered documents in evidence for the reason that said documents are not exemplified as required by the statutes of the United States and the rules of practice of the United States Courts.

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The same are marked "Complainant's Exhibits Case Decree and Blumberg Decree, February 14, 1907, J. A. S., Ex'r."

Mr. MORRILL: The documents having been received in evidence and marked, counsel for Joseph Loewy hereby gives notice that at the proper time he will move to have such documents stricken from the files.

Q. 7. Do you recall that when the business was conducted by the firm of Morison & Hutchinson price-lists were issued?

A. I do.

Q. 8. Can you produce specimens of such price lists?

A. You have them in your hand. I made a practice of collecting these from the first time they issued price lists; that is my own collection you have in your hand.

Q. 9. Can you state when those seven price lists were issued and distributed?

A. I can: February 1, 1876; February 1, 1877; February 1, 1878; January 15, 1879; January 11, 1880; August 1, 1882; July 1, 1883.

Mr. COX: Complainant's counsel offers in evidence price list of February 1, 1876, referred to by the witness and it is agreed that the front and back outside covers of the price lists for 1877, 1878, 1879, 1880 and 1882 are the same as those of the price list of 1876 and that

they may be referred to the same as if said covers were offered in evidence.

Marked "Complainant's Exhibit Morison & Hutchinson Price List, Feb. 14, 1907, J. A. S., Ex'r."

Q. 10. You stated that the complainant and its predecessors since you have been connected with them have been diligent in
85 asserting its rights to its trade mark. I show you a circular: Will you kindly state if you recognize it and if so what is and what was done with it?

A. I do recognize it, and it was a caution to the trade regarding the infringement of our trade marks, saying that we had already commenced a suit against a house in Chicago and we warned others and we published a note from our attorney, Col. Watson, at that time, and this was mailed to the trade and circulated in other ways.

Q. 11. Can you state about when it was first circulated, as you have testified?

A. The letter was dated June 15, 1889; but I can't tell at this late day just what date it came from our printers, or just what day it was printed. It was circulated immediately thereafter.

Q. 12. Sometime in 1889?

A. Yes, sir.

Mr. Cox: I offer it in evidence.

Marked "Complainant's Exhibit Caution to the Trade, February 14, 1907, J. A. S., Ex'r."

No cross-examination.

88

TRADE-MARK.

No. 51,146. REGISTERED APR. 3, 1906.

HUTCHINSON, PIERCE & CO.

SHIRTS, SHIRT WAISTS, AND BLOUSES.

APPLICATION FILED APR. 22, 1905.

No. 182. N.P. & Co. } p88 & Lowry

STAR

WITNESSES:

Gustav Dietrich

Edwin A. Whitfield.

Hutchinson, Pierce & Co PROPRIETOR

BY Phelps & East

ATTORNEYS

86 & 87 EXHIBITS.

89 UNITED STATES PATENT OFFICE.

HUTCHINSON, PIERCE & CO., OF NEW YORK, N. Y.

Trade-mark for Shirts, Shirt-waists, and Blouses.

Statement and Declaration.

No. 51,146. Registered April 3, 1906.

Application Filed April 22, 1905. Serial No. 2,710. Used Ten Years.

Statement.

To all whom it may concern:

Be it known that the Hutchinson, Pierce & Co., a corporation duly organized and existing under and by virtue of the laws of the State of New York, having an office for the transaction of business at Nos. 842 and 844 Broadway, New York city, in said State, has adopted for its use a trade-mark, of which the following is a description.

The trade-mark consists of the word "STAR" and a representation of a star, used singly or together.

The trade-mark has been continuously used in the business of said corporation by it and its predecessors in business, from whom it derived title, since the year 1851.

The class of merchandise to which the trade-mark is appropriated is clothing, and the particular description of goods comprised in said class upon which said trade-mark is used is shirts, shirt-waists, and blouses.

The trade-mark is usually displayed on the articles themselves by being stamped thereon or affixed by means of a ticket sewed to the garments in which the mark is woven or upon which it is stamped or printed and upon the packages or receptacles containing the goods by placing thereon printed labels on which the mark is shown.

HUTCHINSON, PIERCE & CO.,
By GEORGE S. BROWN, *Treas.*

Witnesses:

CHARLES HENRY PHELPS.
ARCHIBALD COX.

(Here follows diagram marked p. 88.)

Declaration.

STATE OF NEW YORK,
County of New York, ss:

George S. Brown, being duly sworn, deposes and says that he is the treasurer of Hutchinson, Pierce & Co., a corporation, the applicant named in the foregoing statement; that he believes that the foregoing statement is true; that he believes said corporation is the owner of the trade-mark sought to be registered; that no other person, firm, corporation, or association, to the best of his knowledge and belief, has the right to use said trade-mark, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that the said trade-mark is used by said corporation in commerce among the several States of the United States, and particularly between New York and Massachusetts; that the description, drawing and facsimiles presented truly represent the trade-mark sought to be registered; and that the mark has been in actual use as a trade-mark of the applicant, or its predecessors from whom it derived title, for ten years next preceding the passage of the act of February 20, 1905, and that, to the best of his knowledge and belief, such use has been exclusive.

GEORGE S. BROWN.

Subscribed and sworn to before me this 20th day of April, 1905.
[L. S.] WALTER H. UNDERWOOD,
Notary Public, New York County, N. Y.

90 & 91 COMPLAINANTS' EXHIBIT BOX LABEL. Oct. 17, 1906.
J. A. S., Ex'r.

DARK PAGE BL

92 COMPLAINANTS' EXHIBIT SHIRT LABEL. Oct. 17, 1906. J. A. S., Ex'r.

93 COMPLAINANTS' EXHIBIT DEFENDANTS' SHIRT. J. A. S., Ex'r. Oct. 17, 1906.

This Exhibit consists of a shirt having upon the inside portion of the yoke a woven label in red like the following:

94 COMPLAINANTS' EXHIBIT DEFENDANTS' BILL. Oct. 17, 1906. J. A. S., Ex'r.

The Busy Store Co., Inc.

Fairfield Ave. and Middle Street.

Dept. E — Bridgeport, June 26, 190
Name F. H. E.
Address
Sold By 2 — Am't Rec'd 1—

Shirt 50

27
C — C

ED THRU

95 COMPLAINANTS' EXHIBIT DEFENDANTS' ADVERTISEMENT. Oct. 18, 1906. J. A. S., Ex'r.

[From the HABERDASHER of October, 1903.]

Established 1870

"Bon Ton" TRADE MARK "Comet"

SHIRTS

NOVELTIES

OUR SPECIALTY!

SAMPLES SUBMITTED UPON APPLICATION

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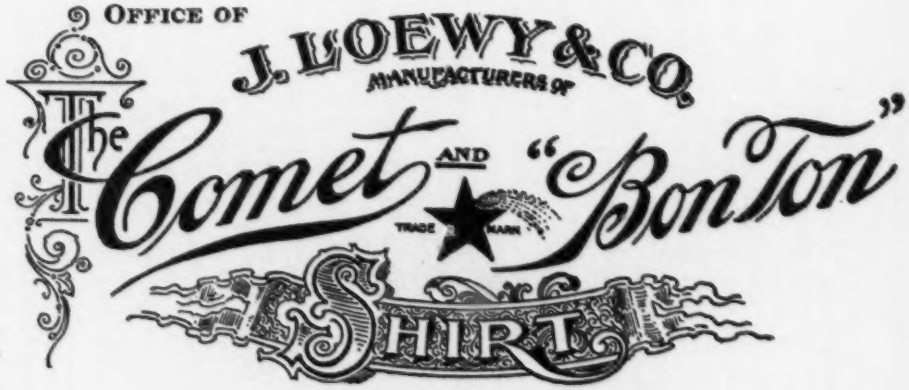

TELEPHONE:
3012 FRANKLIN.

50 LISPENARD STREET, NEAR BROADWAY.

New York, _____

97 COMPLAINANTS' EXHIBIT CASE DECREE. Feb. 14, 1907. J. A. S., Ex'r.

UNITED STATES OF AMERICA,
District of Connecticut, ss:

I, Richard F. Carroll, Deputy Clerk of the Circuit Court of the United States for the District of Connecticut, do certify that the annexed paper is a true copy of the original Decree in Morrison, Son & Hutchinson vs. Case & Rathbun, No. 172 Equity recorded and on file in said Court.

In testimony whereof, I have set hereto my name officially and the Seal of said Court, at Hartford, in said District, this 6th day of February, A. D., 1907.

R. F. CARROLL,
Deputy Clerk.

United States Circuit Court, District of Connecticut, April Term, 1872.

MORISON, SON & HUTCHINSON
vs.
CASE & RATHBUN.

This case having been brought to a final hearing upon the pleadings and proofs, and counsel for respective parties having been heard and the same having been duly considered by the Court; it is found and hereby ordered, adjudged and decreed that the plaintiffs have the exclusive right to the use of their trade-mark; that their
98 said trade-mark is a lawful trade-mark; that the plaintiffs have complied with the requirements of the Act of Congress in relation to trade-marks and are entitled to protection; as is more fully set forth in the opinion of the Court rendered in this case hereunto annexed and made part of this decree; and this Court doth order that a perpetual injunction be awarded to restrain the defendants and each of them, their servants and agents from any use of the words "the Star Shirt," or of the words "the Star Shirt" with the device of a six-pointed Star used in connection therewith; or of the words the Shirt, with the star between them; either in the identical form in which said trade-mark is registered in the patent office, as appears more fully in said opinion made part hereof, or in any form in which it may be calculated to deceive by confounding the goods manufactured and sold by the plaintiffs with shirts made and sold by the defendants.

Defendants to pay plaintiffs' costs of suit to be taxed by the Clerk under the direction of the Court.

WM. D. SHIPMAN, *Judge.*

DARK PA

99 U. S. Circuit Court, District of Connecticut. In Equity.

THOMAS A. MORRISON, GARDNER S. HUTCHINSON, THOMAS H. MORRISON, Partners under the Name of Morrison, Son and Hutchinson,
vs.
JULIUS A. CASE and JULIUS C. RATHBUN, Partners under the Name of Case & Rathbun.

Opinion.

SHIPMAN, *J.*:

This was a bill in equity praying for an injunction to restrain the defendants from using a certain trade-mark upon men-' and boys' shirts. Both firms are shirt manufacturers, selling their goods in the general market. The plaintiffs and their immediate predecessors have been engaged in the manufacture and sale of this class of goods for many years during which the business has grown to a considerable magnitude. For twenty years they have used the trade-mark in question, by stamping or labelling the same upon the shirts manufactured and sold by them and upon their packages and advertisements. In March, 1871, the plaintiffs caused this trade-mark to be registered in the Patent Office at Washington under the Act of Congress approved July 8, 1870, which provides "That any person or firm, domiciled in the United States, and any corporation created by authority of the United States, or of any State or Territory thereof, and any person, firm, or corporation resident of or located in any foreign country, which by treaty or convention affords
100 similar privileges to citizens of the United States, and who are entitled to the exclusive use of any lawful trade-mark or who intend to adopt and use any trade-mark for exclusive use in the United States, may obtain protection for such lawful trade-mark by complying with the following requirements, to-wit:—

First. By causing to be recorded in the patent office the names of the parties and their residences and place of business, who desire the protection of the trade-mark.

Second. The class of merchandise and the particular description of goods comprised in such class, by which the trade-mark has been or is intended to be appropriated.

Third. A description of the trade-mark itself, with *fac similis* thereof, and the mode in which it is intended to be applied and used.

Fourth. The length of time, if any, during which the trade-mark has been used.

Fifth. The payment of a fee of twenty-five dollars, in the same manner and for the same purpose as the fee required for patents.

Sixth. The compliance with such regulations as may be required by the Commissioner of Patents.

Seventh. The filing of a declaration under oath of the person, or some member of the firm or officer of the corporation, to the effect that the party claiming protection for the trade-mark has a right to the use of the same, and that no other person, firm or corporation has the right to such use, either in the identical form or having such

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near resemblance thereto as might be calculated to deceive, and that the description and *fac similis* presented for record are true copies of the trade-mark sought to be protected." (Stats. at Large, Vol. 16, pp. 210, 211.)

The trade-mark in question, as appears by the certificate of the Commissioner of Patents, and the *fac similis* filed in his office in conformity to the Act of Congress, consists of the words, "The Star Shirt," also the words "The Star Shirt" with the device of a
101 six-pointed Star used in connection therewith; and also the words "The Shirt" with the star between them; either one, or all, being used as convenience requires.

Though this device or mark is in part arbitrary and to that extent would have no natural or necessary significance in connection with the article manufactured apart from its use in that connection, yet, by such use of the plaintiffs in connection with their manufacture and sale of these articles it has become well known to the trade, and has come to be taken by dealers as a peculiar designation by which the plaintiffs's goods are distinguished in the market. It is therefore both in its character and use, when taken together, a lawful trade-mark. It has long been employed by the plaintiffs and well understood by dealers, and the public, as designating such articles of their manufacture. They have complied with the requirements of the Act of Congress, and are entitled to protection. Their exclusive right to the use of this trade-mark is co-extensive with the limits of the United States.

The defendants have clearly infringed this right by using the words and device of the plaintiffs, both in the exact form and in such near resemblance as is calculated to deceive. They have done this by so marking the shirts made by them, and by the labels used on their packages and packing boxes. A perpetual injunction must therefore issue restraining them from any use of this trade-mark, either in the identical form in which it is registered in the patent office, or in any form in which it may be calculated to deceive by confounding the goods manufactured and sold by the plaintiffs with shirts made and sold by the defendants.

102 COMPLAINANTS' EXHIBIT BLUMBERG DECREE. Feb. 14/07.
J. A. S., Ex'r.

In the Circuit Court of the United States, Northern District of Illinois, Northern Division.

SATURDAY, *June 11th*, 1892.

Present: Honorable Henry W. Blodgett, District Judge.

21432.

GARDINER S. HUTCHINSON, HENRY B. PIERCE, IRA COLE, and THOMAS S. MORISON,
vs.
JACOB J. BLUMBERG.

This cause having come on to be heard upon the bill of complaint, and the answer of the defendant, and the proofs produced both by the complainants and the defendant including the exhibits produced by both the complainants and defendant and marked herein, and received in evidence, and after hearing B. F. Watson of counsel for the complainants and Elbert C. Ferguson of counsel for the defendant. Now, on consideration thereof, it is hereby ordered, adjudged and decreed, and this Court doth hereby order, adjudge and decree as follows, to-wit:

That the complainants, and their predecessors in business and assignors having their residence and their principal place of business in the City of New York, in the State of New York, have continuously, and since the year 1859, employed as their device and trade-
103 mark to designate their manufacture of shirts, waists, underwear and furnishings manufactured by them, and their ownership therein, the word or designation of a "Star" together with the form and symbol of a star, to represent said word "Star", and also so employed the words "The Star Shirt" and a device of a star in the place of said word "Star" thus "The * Shirt" and also so employed the word "Star" and the device of a star, singly or together, in connection with shirts, waists, underwear and furnishings, plainly marked, written, stamped, printed or placed upon each of said shirts, waists, underwear and furnishings manufactured by them; and also used the same in and upon pictures and drawing- of said shirts, waists, underwear and furnishings, and in advertisements and on boxes, signs, packages and circulars issued by them, and used in their said business.

That the said devices and trademark are in all respects valid as a trademark; and the complainants, constituting the firm of Hutchinson, Pierce & Co. are the owners thereof and entitled to their exclusive use, and are also entitled to all damages accruing to them by reason of the infringement thereof by the defendant, since the beginning of such infringement.

That the defendant residing in and having his principal place of

business in the City of Chicago and State of Illinois has infringed upon the complainants' said devices and trademark; and has for many years used the said word "Star" in connection with the word "Crescent" thus "Star and Crescent Shirtwaist", and has also used the said device or symbol of a Crescent, as a trademark, in violation of the said Complainants' said devices and trademark; and has used the same for the purpose of deceiving purchasers and customers of the Complainants' Shirtwaists, underwear and furnishings, with the belief that the said waists, etc., bearing his trademark were the waists, etc., of the Complainants.

Therefore it is further ordered, adjudged and decreed that the said Complainants do recover of the said defendant the gains,
104 profits and advantages which the said defendant has made or received, or which have accrued to him from the said infringement as aforesaid.

And it is further ordered, adjudged and decreed that the Complainants do recover of the said Defendant their costs, fees, charges and disbursements in this suit to be taxed.

And it is further ordered, adjudged and decreed that unless the Defendant within twenty days from the signing and filing of this decree, file a consent that the amount of such gains, profits and advantages, and the amount of damages suffered by the Complainants by reason of such infringement, shall be entered up in the final decree herein in the sum of $250.00 then this matter be, and hereby is referred to E. B. Sherman, Esq., one of the Masters of this Court to ascertain and determine and report to this Court an account herein, and the number and value of Shirts, Waist-, Underwear or Furnishings infringing the Complainants' said devices and trademark made or sold by the said defendant and the profit received by the defendant therefrom and of all damages suffered by said Complainants by reason of such infringement from the beginning of such infringement.

And it is further ordered, adjudged and decreed that the said Complainants on the accounting above mentioned have the right to cause an examination of said defendant, and also the production of all books, vouchers and documents of said defendant, relating to the manufacture or sale of the Shirts, Waists, Underwear and Furnishings made or sold by the defendant, and infringing the Complainants' devices and trademark as aforesaid; and that said defendant shall attend for that purpose before said Master from time to time as he shall direct.

And it is further ordered, adjudged and decreed that a perpetual injunction be issued out of this court against said Defendant Jacob J. Blumberg, restraining and enjoining him, his agents, clerks, servants and workmen, and all holding under or through
105 them from making, using or selling, or offering for sale Shirts, Waists, Underwear and Furnishings bearing the trademark, or distinguishing mark, consisting of the device or symbol of a Star or the word "Star" used singly or together, or used singly or together with the word "Crescent" or device or symbol of a crescent, or with any other word or device or symbol whatever, and from

selling or offering for sale Shirts, Waists, Underwear and Furnishings manufactured by or for said defendant, as the "Star" Shirts, Waists, Underwear and Furnishings, or as and for the Shirts, Waists, Underwear and Furnishings made by these Complainants.

UNITED STATES OF AMERICA,
Northern District of Illinois, Eastern Division, ss:

I, Marshall E. Sampsell, Clerk of the Circuit Court of the United States, for said Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete copy of the order entered of record in said Court on the 11th day of June A. D. 1892, in the cause wherein Gardiner S. Hutchinson, *et al.*, are the complainants, and Jacob J. Blumberg is the Defendant, as the same appears from the original files and record in said cause now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Chicago, in said District, this 8th day of February A. D. 1907.

[SEAL.] MARSHALL E. SAMPSELL, *Clerk.*

106 COMPLAINANTS' EXHIBIT MORISON & HUTCHINSON PRICE LIST. Feb. 14, 1907. J. A. S., Ex'r.

The following is a fac-simile of the cover or first page:

107 COMPLAINANTS' EXHIBIT CAUTION TO THE TRADE. Feb. 14/07. J. A. S., Exr.

Caution to the Trade.

We have found it necessary to commence a suit against a prominent house in Chicago for the infringement of our Trade-Mark, and to warn a prominent house in St. Louis that suit will be immediately commenced against it, unless prompt satisfaction is made.

This unusual and disagreeable necessity creates an appropriate opportunity for issuing this warning to the Trade, including Manufacturers, Sellers and Buyers. It is well known throughout the Trade in this country, and almost universally acknowledged, that our firm owns and uses a Trade-Mark which it and its predecessors have owned and used for more than 40 years, and the right to which is very valuable. That Trade-Mark consists of a Star, to designate that we are the makers and sellers of the Star Shirts, Waists, Underwear, and Furnishings to which it is attached. It comprehends the word "Star," and the device or symbol of a Star used, singly or together, in connection with our Shirts, Waists, Underwear, and Furnishings, or in connection with the boxes or other packages used for containing the same, or in connection with our advertisements, circulars, and other publications relating to the same. We have determined to punish any infringement of this Trade-Mark. Almost without exception, the Trade for many years have respected our rights, but the superior and reliable quality of our goods bearing our Trade-Mark has become so well known and appreciated as to offer inducements for counterfeiting our Trade-Mark, which in a few instances have been availed of for imposing upon purchasers.

108 We herewith publish the following note from our Attorney:

"18 BROADWAY, NEW YORK, *June* 15, 1889.

"Mess. Hutchinson, Pierce & Co., No. 836 Broadway.

"GENTLEMEN: The word 'Star,' or the device or symbol of a "Star used, singly or together, for indicating your manufacture "and ownership of Shirts, Waists, Underw-are, and Furnishings, is "a lawful Trade-Mark, and your right thereunder is protected by "the Common law and by the Statute law, both civil and criminal, "of many of the States of the Union. It is an infringement of your "rights, for any one to use in connection with such merchandise, "or the boxes or packages used for containing it, any word, mark, "sign, device, or other means, so resembling your Trade-Mark as "will be likely to induce the belief that it is your Trade-Mark.

"Yours truly,

"(Signed) B. F. WATSON."

Yours respectfully,

HUTCHINSON, PIERCE & CO.

109 In the United States Circuit Court, Southern District of New York.

HUTCHINSON, PIERCE & COMPANY, Complainants,
vs.
JOSEPH LOEWY, Respondent.

Notice of Appearance.

The respondent, Joseph Loewy, by his attorney Ira Jay Dutton, hereby enters his general appearance herein.

Dated New York, May 22, 1906.

IRA J. DUTTON,
Solicitor for Respondent,
220 *B'way, Man. Boro., New York City.*

EDWARD T. FENWICK,
Of Counsel.

110 *Notice of Taking Testimony.*

In the Circuit Court of the United States, Southern District of New York.

HUTCHINSON, PIERCE & Co., Complainants,
vs.
JOSEPH LOEWY, Defendant.

Please take notice that on the 14th day of March, 1907, at two o'clock in the afternoon of that date, I shall, at the office of John A. Shields, Esq., at the Post Office Building, in New York City, N. Y., begin to examine witnesses and introduce proof on behalf of the defendant in the above entitled cause.

The examination will be conducted before John A. Shields, a Standing Examiner of this Court, or other competent officer, and will be continued from day to day until completed. You are invited to attend and cross-examine.

Dated New York, N. Y., March 9, 1907.

E. T. FENWICK,
Of Counsel for Defendant.

To Archibald Cox, Esq., Complainants' Solicitor.

Due and timely service of the above notice and receipt of copy admitted this 9th day of March, 1907.

ARCHIBALD COX.

111 United States Circuit Court, Southern District of New York.

HUTCHINSON, PIERCE & COMPANY
vs.
JOSEPH LOEWY.

Depositions of Witnesses.

Testimony on behalf of the defendant, taken pursuant to notice, under and pursuant to the 67th Rule of the Supreme Court, as amended, before John A. Shields, Esq., Standing Examiner, at his office in the Post Office Building, on Thursday, March 14, 1907, at 2 P. M.

Appearances.

Archibald Cox, Esq., for Complainant.
L. L. Morrill, Esq., for Defendant.

JACQUES NEUGASS, called and sworn as a witness on behalf of the defendant, testified as follows:

Direct examination by Mr. MORRILL:

Q. 1. Mr. Neugass, state your age, residence and occupation?
A. 64 years; residence, 718 East 140th street; occupation, embroidery business.
Q. 2. Are you acquainted with the defendant, Joseph Loewy?
A. Yes, sir, I am.
Q. 3. For how many years have you been acquainted with Mr. Loewy?
A. About thirty-eight years.
112 Q. 4. About what year did you make his acquaintance?
A. In 1870, I should judge; 1870.
Q. 5. Were you acquainted with Mr. Loewy's predecesors in business?
A. Yes, sir; I was.
Q. 6. Will you state who they were.
A. His predecessor was Leopold Loewy and Mr. Maurice Senftenberg; also Mr. Leopold Senftenberg.
Q. 7. About what date did you make the acquaintance of the predecessors of Mr. Loewy?
A. Why, I couldn't tell you that; it was in 1869, in the fall of the year; a friend of mine lived with him, you know; it was probably in October of 1869.
Q. 8. From your acquaintance, do you or do you not know whether the predecessors of Mr. Loewy adopted and used any trade-marks?
A. I do know it.
Q. 9. Will you state what trade-marks, if any, they used?
A. It was a Comet and they used it at my suggestion.
Q. 10. Will you state how early a date to your knowledge the predecessors of Mr. Loewy adopted and used the trade-mark Comet?
A. In 1873.

Q. 11. Upon what class of goods?
A. Upon shirt fronts and shirts.

Cross-examination by Mr. Cox:

X Q. 12. What did the mark to which you refer as the Comet look like?
A. Well, it was a Comet; it was a figure with a tail on it, and there was a tale to it, too.
X Q. 13. What sort of a figure?
A. Well, it was a set figure.
X Q. 14. I know, but can't you describe what the figure was?
113 A. I couldn't describe it any different, and even they used it not only in that way, but they had it also in print besides that.
X Q. 15. Can't you describe the figure that had a tail to it?
A. I can mark it for you, probably, you understand; that is all it was.
X Q. 16. Did you ever hear of the word "Star"?
A. Never. If I ever did hear of the word "Star"—if I know what Star means?
X Q. 17. Yes?
A. Of course I do.
X Q. 18. Don't that describe the figure that had a tail to it?
A. No, it doesn't, I beg your pardon, because it was distinctly different from anything like that.
X Q. 19. What was the figure that had the tail to it?
A. A star would be single, and this was not. It would be just a single figure, a star, and this was not it.
X Q. 20. This was a star with a tail to it, wasn't it?
A. No, it wasn't a star; it wasn't anywhere a star.
X Q. 21. What was it like, this figure with a tail to it?
A. It would be like a figure, you understand, with points; it doesn't seem—I haven't got it before me.
X Q. 22. You mean it didn't have any points as a star has?
A. I don't think it was exactly like that.
X Q. 23. Some sort of nebulous matter?
A. Something of that order.
X Q. 24. Circular?
A. Representing a comet.

Redirect examination by Mr. MORRILL:

R. D. Q. 25. Did this figure which was the head of the comet have some points on the outside?

114 Mr. Cox: Objected to as already answered.

A. It was not exactly pointed, you know; it was not in the form of a star; it was a comet.

LEOPOLD SENFTENBERG, called and sworn as a witness on behalf of the defendant, testified as follows:

Direct examination by Mr. MORRILL:

Question 1. State your age, residence and occupation?

Answer. 63; residence, 1184 Madison avenue; occupation, shirt waists.

Q. 2. Are you acquainted with the defendant Joseph Loewy?

A. I am, sir.

Q. 3. At about what date did you make his acquaintance?

Q. It was in the spring of 1871.

Q. 4. Were you or were you not acquainted with the predecessors of Mr. Loewy?

A. I was: I was one member of the firm.

Q. 5. Will you state the several predecessors of Mr. Loewy in business?

A. Leopold Loewy, my uncle Moritz Senftenberg and myself.

Q. 6. Can you state the several names of the parties and firms in the order in which they did business from the beginning of the business down to the present defendant?

A. Well, there was Leopold Loewy and Moritz Senftenberg; the firm was Loewy & Senftenberg. In 1871, I came here from Cincinnati and went in their employ. Later on my uncle withdrew and Moritz Senftenberg and I went under the same style of firm. In the fall of 1878 I associated myself with my brother in business in Texas and withdrew from the firm of Loewy & Senftenberg and Joseph Loewy then entered the firm of L. Loewy & Brother.

Q. 7. The next step?

Mr. COX: That is objected to, because the witness, according to his statement, was in Texas.

115 A. I was not in Texas. I associated myself with my brother in business in Texas, but I was in New York.

Q. 8. The next step?

A. What do you mean?

Q. 9. The next change in the firm?

A. The next change in the firm, the Loewy Brothers separated, and Mr. Joseph Loewy continued the original business. His brother started a separate business.

Q. 10. Were you acquainted with any trade-marks originated and used by Mr. Loewy or his predecessors in business?

A. In the fall of 1873 we adopted the Comet. We were talking for quite a while of getting a trade-mark, and there was—and the way we came to the Comet, there is a tale, a story, connected with it which I don't think is proper to place here. That is how we came to adopt the Comet.

Q. 11. Do you know whether the trade-mark Comet was used by the several firms who were the predecessors of Mr. Loewy during their continuation in business?

A. It has been used continually by us and afterwards from the time we adopted it in 1873.

Q. 12. Do you or do you not know whether the trade-mark mentioned, the Comet, is still in use by the defendant, Joseph Loewy?
A. Yes, sir.
Q. 13. Is the trade-mark Comet, now employed by Mr. Loewy, the same or similar to the trade-mark originally adopted?

Mr. Cox: That is objected as incompetent, because it calls for secondary evidence as the mark should be produced and permitted to speak for itself.

A. Yes, sir.

116 Cross-examination by Mr. Cox:

X Q. 14. You heard Mr. Neugass' description of the mark used back in 1873 here, did you not?
A. Yes, sir.
X Q. 15. Do you agree with that?
A. Yes, sir.

WILLIAM J. WILKINSON, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination by Mr. MORRILL:

Q. 1. State your age, residence and occupation?
A. My age is 50; furnishing buyer; residence, 1239 Thirty-seventh street, Brooklyn.
Q. 2. With whom, if any one, are you associated in business?
A. I am buyer for John McCormick, Fifth avenue and Ninth street, Brooklyn.
Q. 3. Does the firm with whom you are associated handle shirts?
A. Yes, sir.
Q. 4. Will you state some of the trade-marks of the shirts handled by your firm?
A. Well, we use the Lyon brand and we use the Comet; we use the Star, and we use the Sanspareil and the Owl.
Q. 5. Do you know by whom the Star shirt is manufactured?
A. Hutchinson, I believe.
Q. 6. Do you know the full name of the firm?
A. Hutchinson, Pierce & Company, I believe it is.
Q. 7. Do you know the manufacturer of the Comet shirt?
A. Yes, sir.
Q. 8. Will you state who it is?
A. J. Loewy.
Q. 9. For how many years has your firm handled the Star shirt and the Comet shirt?

Mr. Cox: That is objected to because no proper foundation has been laid for the answer.

117 A. Well, they have handled——. I have been there twelve years, and we have handled the Comet during that time. The Star shirt I believe we hadn't handled up to about three years ago, somewhere around there.

Q. 10. Do you personally sell to customers Star shirts and Comet shirts?

A. No, sir; I don't sell goods.

Q. 11. Have you occasion to be familiar with the sale of the shirts?

A. Yes, sir; I am on the floor and see the goods sold and see that the customers are waited on properly.

Q. 12. Do you know whether or not there is any confusion in the sale between the Star shirt and the Comet shirt?

A. No; not that I heard of; they are two different garments altogether.

Q. 13. What amount approximately of Star shirts and Comet shirts does your firm handle?

A. Well, we handle a great many more Comet shirts, because they are a cheaper shirt, lower price shirt. The Star shirt is a more expensive shirt, and we don't sell so very many of them; we carry a few of them. Somewhat better goods, such as Lyon brand and Sanspareil; they are higher grade. The Comet shirt is a lower priced shirt; sells around fifty cents. I believe that is all they manufacture a fifty cent shirt, if I am not mistaken.

Q. 14. Will you state, what, if anything, you know in relation to whether or not customers do or do not call for either of said shirts and receive the other instead?

A. Never in our place. A person calls for a Comet shirt and they get it; if they call for a Star shirt they get it, if we have it in stock. If not, we couldn't sell one for the other, because they are different goods.

118 Q. 15. From your observation what is your opinion as to the probability of confusion between the two shirts in the minds of buyers?

Mr. Cox: That is objected to as incompetent and immaterial.

A. You mean wholesale buyer?

Q. 16. No, retail buyers?

A. Oh, they couldn't conflict in any way that I know of at all. Then, as I said before, the Star shirt is a better grade of goods, a higher grade of goods. The Comet shirt is made from cheaper materials, and sells at a lower price. A party who wants to buy a Star shirt expects to buy a dollar or a dollar and a half shirt; a party who buys a Comet shirt don't expect to pay more than half a dollar for it; that is what they are usually sold for.

Q. 17. In your opinion, and from your observation, what is your opinion as to the liability of a customer being confused by the two trade-marks?

Mr. Cox: That is objected to as incompetent.

A. Well, I don't think they could be; I am positive they couldn't be by the two marks because they are entirely different.

Cross-examination by Mr. Cox:

X Q. 18. I understand you to say that the large majority of purchasers in the store in which you are employed come looking for the cheaper grades of shirts, is that right?

A. A majority of the people are, yes; we are in a neighborhood where we have a great many working people.

119 JOHN B. SEILER, called and sworn as a witness on behalf of the defendant, testified as follows:

Direct examination by Mr. MORRILL:

Q. 1. State your age, residence and occupation?

A. My age is 59; residence, 434 Lafayette street, Newark, N. J.; occupation, dry goods merchant.

Q. 2. As such merchant have you handled men's furnishings of any kind?

A. Yes, sir.

Q. 3. Of what kinds have you handled?

A. Handle everything in the gents' furnishing goods line; hosiery, shirts, suspenders; everything used in that line. Dry goods of all descriptions.

Q. 4. Are you acquainted with the defendant, Joseph Loewy?

A. Yes, sir.

Q. 5. Are you acquainted with the goods manufactured by him?

A. Yes, sir; we handle their shirts right along, and have for the last 32 years.

Q. 6. Were you or were you not acquainted with the predecessors of Mr. Loewy in business?

A. Yes, sir.

Q. 7. For about how long?

A. I became acquainted with him in 1874, in May; it was L. Loewy & Senftenberg at the time.

Q. 8. Did you or did you not at that time purchase goods from the firm?

A. Yes, sir.

Q. 9. Of what class?

A. Principally white shirts and those bosoms, handkerchiefs—principally shirts and bosoms; that was the principal thing at that time.

Q. 10. I hand you an article and ask you to state what it is?

A. Well, that is a boy's bosom. We used to buy them to insert them in shirts when they were worn out; that is a thing out of date now-a-days; I haven't sold a dozen, I think, in twenty years, I don't think I bought one of these—well, I think I could safely say
120 fifteen; I think I am safe on that, a boy's bosom.

Q. 11. Will you examine the article, the bosom, and state whether or not there is any trade-mark pasted thereon?

Mr. COX: Objected to as calling for a conclusion of law, and as secondary, as the article speaks for itself.

Question withdrawn.

Q. 12. Will you examine the article and state what, if any, marks, you find thereon?

Objected to as calling for secondary evidence.

A. Well, I find the marks here that were always on it. There isn't any mark here I put on. Those are all original marks on there. 1800 linen, the style is 1171. We used to buy those things in 16, 18 and 200 and 2100 linen at the time; linen bosoms; that is 1800 linen; that is what that 18 represents; what it has always been known to be.

Q. 13. Will you state further as to any marks by which you could identify the article as being of any particular manufacturer's make?

Objected to as calling for secondary evidence.

A. I can tell by this here Comet.

Q. 14. You speak of a Comet. Will you state if you know whose goods are identified by such Comet?

A. At present it is J. Loewy. I think that Comet was used as long as I can remember dealing with those firms. The successors to Loewy & Senftenberg was Leopold Loewy, and afterwards Loewy Brothers, and recently, or just now, it is J. Loewy, and as far as I can remember back the Comet label was on there when I first started business in 1874, as I remember; I think it was.

Mr. Cox: I move to strike that out as volunteered and irresponsive.

Q. 15. Will you state how many years this particular article has been in your possession?

121 A. Well, I couldn't say positively unless I looked up my bill and found out when I bought the last boy's bosom; that is the only way I can find out. I have the records; it is quite a little work to go back and look those all over. To the best of my knowledge I think at least 15 years.

Q. 16. Will you state whether or not the representation of a Comet referred to was or was not upon that bosom when bought by you?

A. Well, it was on there when I bought it.

The bosom referred to is offered in evidence and marked "Defendant's Exhibit 1, Defendant's Shirt Bosom, J. A. S., Exr., Mar. 14, 1907."

Q. 17. I believe you have testified that you sold the Comet shirt, did you not?

A. Yes, sir.

Q. 18. Have you ever known of any confusion in the minds of purchasers between the Comet shirt sold by you and the Star shirt?

Mr. Cox: That is objected to because no sufficient foundation has been laid for it.

A. No, sir. Personally I never knew anything about a Star shirt until I heard of this here; never heard of the shirt at all; never saw it.

Q. 19. Will you state as near as you can the quantity of Comet shirts handled by you?

Objected to as immaterial.

A. I can't say that positively, because the last six years I don't

run that department myself. My nephew runs that, and I couldn't say exactly what the amount of shirts is bought, but I know it is on every shirt we buy, whether negligee or stiff, or laundered or unlaundered, and we use a great many of them; I couldn't tell exactly how many shirts.

Mr. Cox: I move to strike out the whole of the deposition for reasons stated in the objection.

No cross-examination.
Adjourned subject to notice.

122 At a Stated Term of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, held at the United States Court Rooms, in the Borough of Manhattan, in the City of New York, on Wednesday, the 23d day of October in the year of our Lord one thousand nine hundred and seven.

Present: The Honorable John R. Hazel, Judge.

HUTCHINSON, PIERCE & CO.
v.
JOSEPH LOEWY.

The above entitled cause coming on for final hearing upon the pleadings and proofs, Mr. Archibald Cox is heard on behalf of the complainant.
Mr. Ira J. Dutton is heard on behalf of the defendant.

C. A. V.

An extract from the minutes.

JOHN A. SHIELDS, *Clerk.*

123 Circuit Court of the United States for the Southern District of New York.

HUTCHINSON, PIERCE & CO., Complainant,
against
JOSEPH LOEWY, Defendant.

Archibald Cox, Phelps, Evins & East, for Complainant.
Ira Jay Dutton, E. T. Fenwick, L. L. Morrill, for Defendant.

HAZEL, *J.:*

The bill charges the infringement of the complainant's trade-mark, which originated in its business of manufacturing shirts, waists and blouses, in the year 1840. The trade-mark was registered under the Act of Congress of 1905, on April 3, 1906, and consists "of the word star and the representation of a star, used singly or together." Its distinctive characteristic is the outline of a small star to represent that word signifying to the trade the high class of manufacture of complainant's articles which have become widely and favorably

known as the star shirt, star waist, etc. The asserted infringement by the defendant consists in the use of a solid star in combination with a curved tail in resemblance of a comet. The nucleus of the comet has a five-pointed star with a tail following it and the words "The Comet" are printed in black or red type over or underneath such symbol. I am of the opinion that the defendant's trade-
124 mark or brand is clearly distinguishable from that of complainant. There is no reasonable probability of the ordinary purchaser being deceived into buying the defendant's manufacture as that of complainant. The rule is well established that a trade-mark, word or symbol has the elements of a property right and may not be unlawfully used by a rival in business either alone or as an accessory to such prior appropriation and in such cases a right to injunctive relief follows without proof of confusion of proprietorship or that buyers have been actually misled by such use. But if a defendant's design or symbol is essentially different and distinguishable in appearance so that by no possibility can his article be taken for complainant's genuine production a cause of unlawful appropriation is not maintainable (McLean *vs.* Fleming, 96 U. S., 245; Liggett & Myers Tobacco Co. *vs.* Finzer, 128 U. S., 182).

The complainant's star in outline as shown by the drawing has six points and is one inch in diameter, while the defendant's star is a solid body, 7/16 of an inch in diameter, and the tail, colored red or black, is one inch long. The word "star" is not used by the defendant in combination with the symbol, but, as already mentioned, the words "The Comet" prominently appear in connection therewith. It must be conceded that a comet ordinarily has not the visible outline of a star. Its point is a formation of nebulous matter and is preceded or followed by a luminous curved train, but, nothwithstanding defendant's exaggerated point, neither upon the clothing of defendant's manufacture or on its box label is the emblem as a whole of such similarity to complainant's mark as in my judgment would warrant restraining its use in the absence of proof that confusion of goods existed or that intending purchasers had been deceived in buying defendant's article for that of complainant. The ordinary purchaser buying with reasonable caution would not on account of the brand or mark mistake the goods of the defendant for those of the
125 complainant and the visual impression received by a comparison of the two marks negatives the presumption of fraud or that deception is apt to occur from such use. Moreover, it is proven that the goods of the deferdant have been known to the public by and under the designation of "The Comet" since 1867, while the complainant and its predecessors have sold its goods by the designation of "Star" since 1840.

Attention is directed to the cases of Hutchinson *vs.* Blumberg (51 Fed. Rep., 829), and same *vs.* Covert (51 Fed. Rep., 832). In the first mentioned case the defendant's device or symbol consisted of a star and crescent in combination with the word "Star." In the opinion of the Court the star was the prominent feature in the appropriated trade-mark and because of such prominence in connection with the word star, the defendant's goods, it was decided,

were apt to become known as star goods and hence the public intending to buy complainant's manufacture would be misled into buying that of the defendant. The Court held that the crescent was merely incidental to the representation of the star. In the Covert case, which is also clearly distinguishable, the outline of a star was used with the words "Lone Star" on shirts and clothing. It is not difficult to suppose that such representations are calculated to deceive the public so that they would purchase defendant's goods under the mistaken belief that they were those of complainant.

It is thought that there is nothing in the case of Gannett *vs.* Rupert (127 Fed. Rep., 962), cited by complainant, to conflict with these views. In that case the Court held that as the publication "Home Comfort" was circulated in the same territory of complainant's paper "Comfort," which also had the words "The key to a million homes" printed on the title page, the infringement was clearly established without proof of confusion. Of course, every case
126 must be decided upon its own facts, and though the owner of a valid trade-mark has the unquestionable right to its exclusive use, and colorable imitations thereof which tend to mislead are forbidden, yet the resemblance to the original must impart to an ordinary purchaser exercising reasonable care a misleading or false impression as to the origin of the goods he is buying. In this case the words "The Comet" used to advertise defendant's goods, and which are prominently printed in connection with the symbol, materially differentiate the star trade-mark in suit and I think negative the inference of colorable imitation which otherwise might be considered clearly established. In support of the views herein expressed reference is made to the following adjudications: McLean *vs.* Fleming, *supra;* Liggett & Myers Tobacco Co. *vs.* Finzer, *supra;* Kann *vs.* Diamond Steel Co., 89 Fed. Rep., 706.

The bill is dismissed, with costs.

(Endorsed:) Circuit Court of the United States, for the Southern District of New York.—Hutchinson, Pierce & Co. Complainant, *vs.* Joseph Loewy, Defendant.—Opinion, Hazel, *J.*—U. S. Circuit Court, Southern District, N. Y.—Filed Dec. 4, 1907.—John A. Shields, Clerk.

127 At a Stated Term of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit, held at the United States Court House and Post Office Building, in the City of New York, Borough of Manhattan, in said District, on the 13th day of January, 1908.

Present: Hon. John R. Hazel, Judge.

In Equity.

HUTCHINSON, PIERCE & Co., Complainant,
vs.
JOSEPH LOEWY, Defendant.

Final Decree.

This cause came on to be heard at this term and was argued by counsel; and thereupon, upon consideration thereof, it was

Ordered, adjudged and decreed, and the Court doth hereby order, adjudge and decree, that the bill of complaint in the above entitled cause be, and the same is, hereby dismissed with costs to the defendant to be taxed.

JOHN R. HAZEL, *U. S. J.*

(Endorsed:) United States Circuit Court, Southern District of New York.—Hutchinson, Pierce & Co., Complainant, *vs.* Joseph Loewy, Defendant.—Final Decree.—Notice of settlement of the within decree is waived. Archibald Cox, Sol. for Complt.—U. S. Circuit Court, Southern District of N. Y.—Filed Jan. 13, 1908.—John A. Shields, Clerk.

128 United States Circuit Court, Southern District of New York.

HUTCHINSON, PIERCE & Co., Complainant,
vs.
JOSEPH LOEWY, Defendant.

Assignment of Errors.

And now comes the complainant and says that in the record and proceedings of said Court in the above entitled cause, and in the final decree made and entered therein on the 13th day of January, 1908, there is manifest error, and for error the said complainant assigns the following:

1. The Court erred in basing its decision on matters not in issue.

2. The Court erred in failing to give effect to the rule that in the case of a technical trade-mark the fact of its use by another upon an article of the same class creates a cause of action.

3. The Court erred in holding that the use by the defendant of accessories in connection with the mark justified the use of complainant's trade-mark on defendant's good- and in his advertising.

4. The Court erred in holding that it was incumbent on the complainant to prove that "confusion of goods existed or that intending purchasers had been deceived in buying defendant's article for that of complainant."

129 5. The Court erred in not holding that the appropriation and impairment of complainant's property in its trade-mark should be restrained.

6. The Court erred in not restraining the use by the defendant of complainant's trade-mark.

7. The Court erred in not granting the relief prayed for in the bill of complaint.

8. The Court erred in dismissing the bill of complaint.

Dated January 18, 1908.

ARCHIBALD COX,
Solicitor for Complainant.

(Endorsed:) United States Circuit Court, Southern District of New York.—Hutchinson, Pierce & Co., Complainant, *vs.* Joseph Loew-, Defendant.—Assignment of Errors.—U. S. Circuit Court, Southern District of N. Y.—Filed Jan. 20, 1907.—John A. Shields, Clerk.

United States Circuit Court, Southern District of New York. In Equity.

HUTCHINSON, PIERCE & Co., Complainant,
vs.
JOSEPH LOEWY, Defendant.

Petition for Appeal.

The above named complainant, Hutchinson, Pierce & Co., conceiving itself aggrieved by the final decree filed and entered

130 in the office of the Clerk of this Court, on the 13th day of January, 1908, in the above entitled cause, does hereby appeal therefrom to the United States Circuit Court of Appeals for the Second Circuit, and prays that its appeal may be allowed and a citation granted, directed to the above named defendant, Joseph Loewy, commanding him to appear before the United States Circuit Court of Appeals for the Second Circuit, to do and receive what may appertain to justice to be done in the premises, and that a transcript of the record, proceedings and evidence in said cause, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Second Circuit.

Dated New York City, January 18, 1908.

ARCHIBALD COX,
Solicitor for Complainant.

The complainant having given the proper security for costs, it is

Ordered, that the foregoing appeal be and the same is hereby allowed.

Dated January 20, 1908.

E. H. LACOMBE,
U. S. C. J.

(Endorsed:) United States Circuit Court, Southern District of New York.—Hutchinson, Pierce & Co., Complainant, *vs.* Joseph Loewy, Defendant.—Petition for Appeal, and Order Allowing same.—Due service of within Petition for Appeal and Order Allowing same admitted Jan. 21st, 1908, Ira Jay Dutton, Def't's solicitor.—Ira Jay Dutton, Def't's solicitor.—U. S. Circuit Court, Southern District of N. Y.—Filed Jan. 21, 1908.—John A. Shields, Clerk.

131 Federal Union Surety Company.

Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

HUTCHINSON, PIERCE & Co., Complainant,
vs.
JOSEPH LOEWY, Defendant.

Bond for Damages and Costs.

Know all Men by these Presents, that the Federal Union Surety Company, a corporation organized under the laws of the State of Indiana, and having its principal office in the City of Indianapolis, Indiana, and lawfully transacting business in the State of New York, and having its principal office in said State at No. 1 Madison avenue, in the Borough of Manhattan, in the City of New York, is held and firmly bound unto the above named Joseph Loewy, in the sum of two hundred and fifty ($250.00) dollars, to be paid to the said Joseph Loewy, for the payment of which, well and truly to be made, it binds itself, its successors and assigns, jointly and severally, firmly by these presents. Sealed with its seal and dated the 20th day of January, in the year of our Lord one thousand nine hundred and eight.

Whereas, the above named Hutchinson, Pierce & Co. has prosecuted an appeal to the United States Circu-t Court of Appeals for the Second Circuit to reverse the decree rendered in the above entitled suit, by the Judge of the Circuit Court of the United States
132 for the Southern District of New York.

Now, therefore, the condition of this obligation is such that if the above named Hutchinson, Pierce & Co. shall prosecute its appeal to effect, and answer all damages and costs, if it fail to make said plea good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

FEDERAL UNION SURETY COMPANY,
[L. S.] By ROBERT M. NUGENT,
Resident Vice-President.

Attest:
E. B. HOXIE,
Resident Assistant Secretary.

Sealed and delivered and taken and acknowledged this 20th day of January, 1908, before me.

ESTHER BERG,
Notary Public, New York County.

Cert. filed in Kings, Queens, Suffolk, Richmond and Westchester Counties.

STATE OF NEW YORK,
County of New York, ss:

On this 20th day of January, 1908, before me personally appeared Robert M. Nugent, resident vice-president of the Federal Union Surety Company, with whom I am personally acquainted, who, being by me duly sworn, said: That he resides in the County of New York; that he is the resident vice-president of the Federal Union Surety Company, the corporation described in and which executed the foregoing bond; that he knows the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal; that it was affixed by order of the Board of Directors of the said company, and that he signed said instrument as resident vice-president of said company by like authority, and that the liabilities of said company do not exceed its assets, as ascertained in the manner provided by law and confirmed by an order of
133 the Supreme Court of New York made and entered in New York County on March 30, 1904, and the said Robert M. Nugent further said that he is acquainted with E. B. Hoxie, and knows him to be the resident assistant secretary of said company; that the signature of said E. B. Hoxie, subscribed to the said instrument is in the genuine handwriting of the said E. B. Hoxie, and was thereto subscribed by the like order of the said Board of Directors, and in the presence of him, the said Robert M. Nugent, resident vice-president.

Robert M. Nugent, of New York City, N. Y., is attorney for service of process for the district in which this bond is given.

[L. S.] ESTHER BERG,
Notary Public, New York County.

Cert. filed in Kings, Queens, Suffolk, Richmond and Westchester Counties.

Copy of By-Law.

Be it Remembered, That at a meeting of the Board of Directors of the Federal Union Surety Company, duly called and held on the tenth day of July, 1901, a quorum being present, the following By-Law was adopted:

"Article VIII, SEC. 1. The President, Vice-President or Second "Vice-President may, from time to time, appoint Resident Vice-"Presidents, Resident Assistant Secretaries and Attorneys in fact, to "represent and act for and on behalf of the Company; and either the "President, Vice-President, Second Vice-President, the Board of "Directors or the Executive Committee may, at any time, remove

"any such Resident Vice-President, Resident Assistant Secretary, or "Attorney in Fact, and revoke the power and authority given "him.

134 "SEC. 3. *Resident Vice-Presidents.*—Resident Vice-Presi- "dents shall have power and authority to sign and execute on "behalf of the Company, any and all bonds, recognization, con- "tracts of indemnity, and other writings obligatory in the nature "thereof, and to bind the Company thereby as fully and to the same "extent as the President could bind it.

"SEC. 4. Resident Assistant Secretaries shall have power and au- "thority to affix the seal of the Company to, and attest on behalf of "the Company, any and all bonds recognizances, contracts of in- "demnity and other writings obligatory in the nature thereof as "fully and to the same extent as the Secretary could bind it."

STATE OF NEW YORK,
County of New York, ss:

I, E. B. Hoxie, resident assistant secretary of the Federal Union Surety Company, have compared the foregoing by-law with the original thereof as recorded in the minute book of said company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original by-law.

Given under my hand and seal of the company, this 20th day of January, 1908.

[L. S.]

E. B. HOXIE,
Resident Assistant Secretary.

(Endorsed:) U. S. Circuit Court, Southern District of N. Y.—Filed Jan. — 1908—John A. Shields, Clerk—United States Circuit Court, Southern District of New York.—Hutchinson, Pierce & Co., Complainant, against Joseph Loewy, Defendant.—Copy.—Bond for Damages and Costs.—Surety: Federal Union Surety Company.—Approved as to form and also as to sufficiency of sureties, with reservation, however, to the Def't of the right at any time to examine the proper officers of the Surety Company, under oath touching its assets, liabilities and financial condition generally. E. H. Lacombe, U. S. Circuit Judge.

135 By the Honorable E. Henry Lacombe, one of the Judges of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

To Joseph Loewy, Greeting:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, on the 17th day of February, 1908, pursuant to an appeal filed in the Clerk's office of the Circuit Court of the United States for the Southern District of New York, wherein Hutchinson, Pierce & Co. is appellant, and you are appellee,

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to show cause, if any there be, why the final decree in said appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 20th day of January, in the year of our Lord one thousand nine hundred and seven, and of the Independence of the United States the one hundred and thirty-second.

E. H. LACOMBE,
Judge of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

(Endorsed:) United States Circuit Court of Appeals for the Second Circuit.—Hutchinson, Pierce & Co., Appellant, *vs.* Joseph Loewy, Appellee.—Citation.—Due service of within citation admitted Jan. 21st, 1908, Ira Jay Dutton, Def't's Solicitor.—U. S. Circuit Court, Southern District of N. Y.—Filed Jan. 21, 1908.—John A. Shields, Clerk.

136 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, do hereby certify that the foregoing pages numbered from — to — inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause entitled Hutchinson, Pierce & Company, complainant-appellant, against Joseph Loewy, defendant-appellee, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 5th day of February, in the year of our Lord one thousand nine hundred and eight, and of the Independence of the said United States the one hundred and thirty-second.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

137 United States Circuit Court of Appeals for the Second Circuit, October Term, 1907.

Argued April 8, 1908; Decided May 5, 1908.

No. 237.

HUTCHINSON, PIERCE & COMPANY, Complainants-Appellants,
vs.
JOSEPH LOEWY, Defendant-Appellee.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Before Judges Lacombe, Ward and Noyes.

WARD, *Circuit Judge:*

This is an action in equity for an injunction, an accounting of profits and damages, the complainant alleging that the defendant has infringed its technical trade-mark applied to shirts and has also been guilty of unfair competition. As the complainant is a corporation of the State of New York and the defendant is a citizen of the same state, the court's jurisdiction extends only to the use of the registered trademark in commerce between the states, with foreign nations and the Indian tribes.

There is no testimony showing that the defendant has passed off or intended to pass off his goods for the complainant's or that the defendant has made profits or the complainant sustained damage. Such an intention and such consequences are quite immaterial inasmuch as the cause proceeds solely upon the complainant's
138 ownership of its technical trademark. If the defendant infringes it, the injunction should issue regardless of his intention or of the consequence. *Lawrence Manufacturing Co.* v. *Tennessee Manufacturing Co.*, (138 *U. S.* 537); *Gannert* v. *Rupert*, (127 *F. R.* 962.)

The complainant has registered in the U. S. Patent Office as its trademark used for more than ten years theretofore in commerce among the several states the word "Star" and the outline of a six-pointed star either singly or together, as follows:

STAR

The defendant uses as its trademark on its shirts a comet consisting of a five-pointed solid star with a nebulous tail, together with the words "The Comet" as follows:

These two trademarks are obviously not identical and the defendant cannot be said to have literally appropriated the complainant's property. And not using the identical mark he cannot be said to have appropriated the complainant's property unless he uses something so like it as to be readily taken for it. But the complainant claims that it is entitled to an exclusive property in the word and symbol "Star" as applied to shirts whether they are used alone or in combination with other words and symbols.

A comet is defined in the Standard Dictionary as "A heavenly body consisting of a coma surrounding a bright star-like
139 nucleus with a nebulous tail or train, often of great length."

The head of the comet in the defendant's trademark is a solid five-pointed star, but we do not think his trademark sufficiently resembles the complainant's to be mistaken for it or to cause confusion or to deceive purchasers, which is the test prescribed as to registration in Section 5 of the Trademark Act of February 20, 1905.

The complainant relies upon the case of *Hutchinson* v. *Blumberg*, (51 *F. R.* 829) as showing that a star cannot be applied as a trademark to shirts even in combination with other symbols, as, for example, a crescent. But this was a case of unfair competition and the court found that the defendant gave such prominence both to the word and symbol "Star" as to deceive purchasers and cause them to think they were buying complainant's "Star" shirts. Judge Blodgett said nothing to indicate that an injunction should issue as against a trademark so little like complainant's as is the defendant's in this case where complainant relies solely upon the property right in the trademark.

The decree is affirmed with costs.

Archibald Cox, for the Appellants.
E. T. Fenwick, for the Appellee.

140 At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 15th day of May, one thousand nine hundred and eight.

Present: Hon. E. Henry Lacombe, Hon. Henry G. Ward, Hon. Walter C. Noyes, Circuit Judges.

HUTCHINSON, PIERCE & COMPANY, Complainants-Appellanys,
vs.
JOSEPH LOEWY, Defendant-Appellee.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the Circuit Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said Circuit Court be and it hereby is affirmed with costs.

W. C. N.

It is further ordered that a Mandate issue to the said Circuit Court in accordance with this decree.

141 Endorsed: United States Circuit Court of Appeals, Second Circuit. Hutchinson, Pierce & Co. vs. J. Loewy. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed May 15, 1908. William Parkin, Clerk.

142 United States Circuit Court of Appeals for the Second Circuit.

HUTCHINSON, PIERCE & CO., Complainant and Appellant,
vs.
JOSEPH LOEWY, Defendant and Appellee.

Petition for Appeal.

The appeal of the above named complainant and appellant, Hutchinson, Pierce & Co., respectfully shows:

The bill of complaint in this cause was filed on the 14th day of May, 1906, to restrain the defendant herein from infringing upon the complainant's trade-mark by it registered on the 3d day of April, 1906, in pursuance of an Act of Congress, Approved February 20, 1905, entitled "An Act to authorize the registration of trade-marks used in commerce with foreign nations or among the several states or with Indian Tribes, and to protect the same," to which bill the said defendant, on the 2nd day of July, 1906, filed an answer, and thereafter the complainant filed a general replication.

This cause thereupon came on for final hearing before the United States Circuit Court for the Southern District of New York upon the

pleadings and proofs, and counsel for the respective parties having been duly heard, the Court rendered its decision, and a final decree was, on the 13th day of January, 1908, made dismissing the said bill of complaint upon the merits, with costs to the defendant, which decree was filed and entered in this cause in the office of the
143 Clerk of said Court on the 13th day of January, 1908.

On the 20th day of January, 1908, the appeal of the above named complainant to the United States Circuit Court of Appeals for the Second Circuit from said final decree of the Circuit Court of the United States for the Southern District of New York was allowed and a citation issued to the defendant herein.

The said appeal came on for argument before the United States Circuit Court of Appeals for the Second Circuit, and after hearing counsel for the respective parties the Court rendered its decision, and an order and decree affirming the said final decree of the said United States Circuit Court for the Southern District of New York was on the 15th day of May, 1908, made by the said United States Circuit Court of Appeals for the Second Circuit, which was duly entered in this cause in the office of the Clerk of said Court.

Wherefore the above named complainant and appellant, conceiving itself aggrieved by the decision, order, and decree of the said United States Circuit Court of Appeals for the Second Circuit, dated the 15th day of May, 1908, made in the above entitled cause, does hereby appeal therefrom to the Supreme Court of the United States, and it prays that its appeal may be allowed and a citation granted, directed to the above named defendant and appellee, commanding him to appear before the Supreme Court of the United States to do and receive what may appertain to justice to be done in the
144 premises, and that a transcript of the record, proceedings and evidence in said cause, duly authenticated, may be sent to the Supreme Court of the United States.

Dated, New York City, N. Y., June 16, 1908.

ARCHIBALD COX,
Solicitor and Counsel for Complainant and Appellant.

The complainant and appellant having filed the necessary security for costs, it is—

Ordered that the foregoing appeal be, and the same is hereby, allowed.

Dated, New York City, N. Y., June 17, 1908.

(S'gn'd) E. H. LACOMBE,
U. S. Circuit Judge.

145 Endorsed: U. S. Circuit Court of Appeals, for the Second Circuit. Hutchinson, Pierce & Co., Compl't and Appellant, vs. Joseph Loewy, Defendant and Appellee. Petition for Appeal and Order Allowing Same. Archibald Cox, Counsel for Compl't-App'l't, 229 Broadway (Bor. of Man.), New York City, N. Y. United States Circuit Court of Appeals, Second Circuit. Filed Jun-17, 1908. William Parkin, Clerk.

146 Copy.

Federal Union Surety Company.

United States Circuit Court of Appeals for the Second Circuit.

HUTCHINSON, PIERCE & COMPANY, Complainant and Appellant,
vs.
JOSEPH LOEWY, Defendant and Appellee.

Bond for Damages and Costs.

Know all men by these presents, That the Federal Union Surety Company, a corporation organized under the laws of the State of Indiana and having its principal office in the City of Indianapolis, Indiana, and lawfully transacting business in the State of New York, and having its principal office in said State at No. 1 Madison Avenue, in the Borough of Manhattan, in the City of New York, is held and firmly bound unto the above named Joseph Loewy in the sum of Two hundred and fifty ($250.00) dollars, to be paid to the said Joseph Loewy for the payment of which well and truly to be made, it binds itself, its successors and assigns, jointly and severally, firmly by these presents. Sealed with its seal, and dated the 15th day of June, in the year of our Lord one thousand nine hundred and eight.

Whereas, the above named Hutchinson, Pierce & Company has prosecuted an appeal to the United States Supreme Court to reverse the final Order, Decision and Decree rendered in the above entitled suit, by the Judge of the United States Circuit Court of Appeals for the Second Circuit.

Now, therefore, the condition of this obligation is such, that if the above named Hutchinson, Pierce & Company shall prosecute said Appeal to effect, and answer all damages and costs if it shall fail to make its plea good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

FEDERAL UNION SURETY COMPANY,
By ROBERT M. NUGENT,
Resident Vice-President.

Attest:
E. B. HOXIE,
Resident Assistant Secretary.

Sealed and delivered, and taken and acknowledged this 15th day of June, 1908, before me,

[L. S.] GERTRUDE M. MACDONALD,
Notary Public, New York County.

Cert. filed in Kings, Queens, Suffolk, Richmond & Westchester Counties.

147 STATE OF NEW YORK,
County of New York, ss:

On this 15th day of June, 1908, before me personally appeared Robert M. Nugent, Resident Vice President of the Federal Union Surety Company, with whom I am personally acquainted, who, being by me duly sworn, said that he resides in the County of New York, that he is the Resident Vice President of the Federal Union Surety Company, the corporation described in and which executed the foregoing bond; that he knows the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal; that it was affixed by order of the Board of Directors of the said company, and that he signed said instrument as Resident Vice President of said company by like authority; and that the liabilities of said company do not exceed its assets, as ascertained in the manner provided by law and confirmed by an order of the Supreme Court of New York made and entered in New York County on March 30, 1904. And the said Robert M. Nugent, further said that he is acquainted with E. B. Hoxie, and knows him to be the Resident Assistant Secretary of said company; that the signature of said E. B. Hoxie, subscribed to the said instrument is in the genuine handwriting of the said E. B. Hoxie, and was thereto subscribed by the like order of the said Board of Directors, and in the presence of him, the said Robert M. Nugent, Resident Vice-President.

GERTRUDE M. MACDONALD,
Notary Public, New York County.

Cert. filed in Kings, Queens, Suffolk, Richmond & Westchester Counties.

Copy of By-Law.

Be it Remembered, That at a meeting of the Board of Directors of the Federal Union Surety Company, duly called and held on the tenth day of July, 1901, a quorum being present, the following By-Law was adopted:

"ARTICLE VIII, SEC. 1. The President, Vice-President, or Second "Vice-President may, from time to time, appoint Resident Vice-"Presidents, Resident Assistant Secretaries and Attorneys in fact, "to represent and act for, and on behalf of the Company; and either "the President, Vice-President, Second Vice-President, the Board of "Directors or the Executive Committee may, at any time, remove "any such Resident Vice-President, Resident Assistant Secretary, or "Attorney in Fact, and revoke the power and authority given him.

"SEC. 3.—*Resident Vice-Presidents.* Resident Vice-Presidents shall "have power and authority to sign and execute on behalf of the "Company, any and all bonds, recognization, contracts of indemnity "and other writings obligatory in the nature thereof, and to bind "the Company thereby as fully and to the same extent as the Presi-"dent could bind it."

"SEC. 4.—Resident Assistant Secretaries shall have power and "authority to affix the seal of the Company to, and attest on behalf "of the Company, any and all bonds recognizances, contracts of

"indemnity and other writings obligatory in the nature thereof as "fully and to the same extent as the Secretary could bind it."

(Endorsed:) United States Circuit Court of Appeals for the Second Circuit. Hutchinson, Pierce & Company, Complainant and Appellant, against Joseph Loewy, Defendant and Appellee. Copy. Bond for damages and costs. Surety: Federal Union Surety Company. I approve of the within bond, and of the sufficiency of the surety. (Sgnd.) E. H. Lacombe, U. S. C. J. United States Circuit Court of Appeals, Second Circuit. Filed June 17, 1908. William Parkin, clerk.

STATE OF NEW YORK,
County of New York, ss:

I, E. B. Hoxie, Resident Assistant Secretary of the Federal Union Surety Company, have compared the foregoing By-Law with the original thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original By-Law.

Given under my hand and seal of the Company, this 15th day of June, 1908.

[L. S.] E. B. HOXIE,
Resident Assistant Secretary.

148 United States Circuit Court of Appeals for the Second Circuit.

HUTCHINSON, PIERCE & Co., Complainant and Appellant,
vs.
JOSEPH LOWEY, Defendant and Appellee.

Assignment of Errors.

And now comes the Complainant and Appellant and says that in the record and proceedings of the said Court in the above entitled cause and in the decision, order and decree made and entered therein on the 15th day of May, 1908, there is manifest error, and for error the said Complainant and Appellant assigns the following:

1. The Court erred in not holding that the complainant being the owner of a trade-mark for shirts, consisting of a star (whether verbally or pictorially expressed), and having duly registered the same under the Act of Congress, was entitled to an injunction restraining the unauthorized use by the defendant of a reproduction, counterfeit, copy, or colorable imitation, of such trade-mark, to wit, a star, regardless of dots or words or other matter accompanying it, upon or in connection with the sale of merchandise of substantially the same descriptive properties.

2. The Court erred in holding that the complainant had
149 registered a six pointed star and in not holding that the complainant owned and had registered as its trade-mark a star broadly, whether expressed pictorially or verbally.

3. The Court erred in basing its decision on the test prescribed as to registration by Section 5 of the Act of Congress of February 20, 1905, and in not applying the test prescribed as to infringement by Section 16 of said Act.

4. The Court erred in not granting an order and decree for mandate directing the Circuit Court of the United States for the Southern District of New York to vacate the final decree entered therein on the 13th day of January, 1908, and directing that a decree be entered therein granting the complainant the relief prayed for in the bill.

5. The Court erred in entering an order and decree for mandate affirming the final decree of the Circuit Court of the United States for the Southern District of New York, entered therein on the 13th day of January, 1908.

Dated, June 16th, 1908.

ARCHIBALD COX,
Solicitor and Counsel for Complainant and Appellant.

150 (Endorsed:) U. S. Circuit Court of Appeals for the Second Circuit. Hutchinson, Pierce & Co., Compl't and Appellant, vs. Joseph Loewy, Defendant and Appellee. Assignment of Errors. United States Circuit Court of Appeals, Second Circuit. Filed Jun-17, 1908. William Parkin, Clerk.

151 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 150 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Hutchinson, Pierce & Company against Joseph Loewy, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 18th day of June in the year of our Lord One Thousand Nine Hundred and Eight and of the Independence of the said United States the One Hundred and thirty-second.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

152 By the Hon. E. Henry Lacombe, one of the Judges of United States Circuit Court of Appeals for the Second Circuit, to Joseph Loewy:

Whereas, Hutchinson, Pierce & Co., has lately appealed to the Supreme Court of the United States from a decision, order, and decree lately rendered in the United States Circuit Court of Appeals for the Second Circuit, made in favor of you, the said Joseph Loewy, and has filed the security required by law, you are therefore cited to

appear before the said Supreme Court of the United States, at the City of Washington, in the District of Columbia, on the 17th day of July, 1908, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the City of New York, in the Southern District of New York, in the Second Circuit, on the 17th day of June, in the year of our Lord one thousand nine hundred and eight.

E. H. LACOMBE,
U. S. Circuit Judge.

Service of a copy of the foregoing citation admitted June 18th, 1908.

IRA JAY SUTTON,
Solicitor and Counsel for Defendant and Appellee.

153 [Endorsed:] U. S. Circuit Court of Appeals for the Second Circuit. Hutchinson, Pierce & Co., Compl't and Appellant, vs. Joseph Loewy, Defendant and Appellee. Citation. United States Circuit Court of Appeals, Second Circuit. Filed Jun- 18, 1908. William Parkin, Clerk.

Endorsed on cover: File No. 21,234. U. S. Circuit Court Appeals, 2d Circuit. Term No. 182. Hutchinson, Pierce & Co., appellant, vs. Joseph Loewy. Filed June 23d, 1908. File No. 21,234.

Office Supreme Court U. S.
FILED
APR 16 1910
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 182.

HUTCHINSON, PIERCE & CO.,
Appellant,

vs.

JOSEPH LOEWY,
Respondent.

BRIEF OF ARGUMENT ON BEHALF OF APPELLANT.

C. G. Burgoyne, 72 to 78 Spring Street, New York.

Supreme Court of the United States.

HUTCHINSON, PIERCE & Co., Appellant, vs. JOSEPH LOEWY, Respondent.	October Term, 1909. No. 182.

BRIEF OF ARGUMENT ON BEHALF OF APPELLANT.

This is an appeal from a decision (R., p. 93) of the United States Circuit Court of Appeals for the Second Circuit affirming a decree of the Circuit Court for the Southern District of New York dismissing the bill in a suit in equity brought by a New York corporation to restrain the use by a citizen of New York of a trade-mark registered under the Act of Congress of February 20, 1905.

The appellant is the manufacturer of the well-known "Star" shirts and the owner of the trade-mark accurately defined in the certificate of registration as follows:

> "The trade-mark consists of the word 'Star' and the representation of a star, used singly or together" (R., p. 61).

The respondent uses on his shirts a mark (illustrated on pages 63, 64, 65) consisting of a star, with dots forming a tail, which he calls "Comet." The bill was filed to restrain the

use of the star—just that, and not the dots or word "Comet"—by the respondent.

The single question presented is, we think, whether the respondent may continue to use the appellant's registered trade-mark.

Both Courts below found that the appellant is the owner of a valid technical trade-mark, but held that the respondent's use of it—or what the court of first instance called "defendant's exaggerated point" (R., p. 83), and the Court of Appeals called the "solid five pointed star" (R. 92)—was not unlawful because, in view of the accessories accompanying it, confusion seemed to them improbable.

The conclusion as to appellant's trade-mark and the result reached in the Courts below placed side by side seem to be in effect: The appellant has a valid trade-mark, but it is hereby taken from it and made *publici juris*. This seems to be the result, because, in the words of this Court, "the right of individual appropriation once lost is gone forever" (Saxlehner v. Eisner, 179 U. S., p. 36; Saxlehner v. Wagner, 216 U. S. 381).

The jurisdiction of the Circuit Court resting solely upon a law of the United States (the Trade-Mark Act of February 20, 1905), and the decision of the Circuit Court of Appeals not being expressly made final, this appeal has been taken.

The Assignment of Errors.

What we respectfully venture to think was the fundamental error in the Courts below is in the view of the law which the opinions express and the decision more conspicuously illustrates. In substance and effect that view is that a technical trade-mark (and the years of painstaking efforts towards excellence and industry and expenditure, which it embodies) is no longer to be protected as other property, but is to be held subject to the imaginative powers of the particular tribunal before whom an appropriation may be brought, so

that, according to whether the mind of that tribunal pictures the future effect of the alleged infringement readily or otherwise, the property is protected or destroyed.

The result of this doctrine, we respectfully venture to suggest, is that enormous investments are made to depend upon nothing more reliable than a guess, and that an investment of great value, in the present instance, is impaired, if not destroyed, to no purpose but the discouragement of excellence and the encouragement of imposition and fraud.

In the case of a technical trade-mark, the *certainty* of protection, whereby investment in industries based on excellence is encouraged, is, we understand, the controlling consideration. That certainty cannot be secured by a rule which necessarily involves individual speculation in its application. It is secured only by the settled rule that a trade-mark is the property of its owner and that, *not the consequences* of its use by another but "*the fact* of its use by another creates a cause of action" (179 U. S. 677).

If the appellant has merely a right to be protected against the sale of the respondent's goods as its goods, the decision below may or may not be right—there is in the absence of satisfactory evidence concerning the past and future (which in the nature of things cannot be found) no possible way of being sure. If, on the other hand, the appellant has a right of property in its trade-mark, the decision should be reversed and the use and destruction of that mark by the respondent prevented.

The assignment of errors is as follows:

1. The Court erred in not holding that the complainant being the owner of a trade-mark for shirts, consisting of a star (whether verbally or pictorially expressed), and having duly registered the same under the Act of Congress, was entitled to an injunction restraining the unauthorized use by the defendant of a reproduction, counterfeit, copy, or colorable imitation, of such trade-mark, to wit, a star, regardless of dots or words

or other matter accompanying it, upon or in connection with the sale of merchandise of substantially the same descriptive properties.

2. The Court erred in holding that the complainant had registered a six pointed star and in not holding that the complainant owned and had registered as its trade-mark a star broadly, whether expressed pictorially or verbally.

3. The Court erred in basing its decision on the test prescribed as to registration by Section 5 of the Act of Congress of February 20, 1905, and in not applying the test prescribed as to infringement by Section 16 of said Act.

4. The Court erred in not granting an order and decree for mandate directing the Circuit Court of the United States for the Southern District of New York to vacate the final decree entered therein on the 13th day of January, 1908, and directing that a decree be entered therein granting the complainant the relief prayed for in the bill.

5. The Court erred in entering an order and decree for mandate affirming the final decree of the Circuit Court of the United States for the Southern District of New York, entered therein on the 13th day of January, 1908.

DARK PAGE B

The Pleadings.

The Bill of Complaint recites the commercial genealogy of the appellant, which owns and carries on a well-known business, established in 1840, of manufacturing shirts and analogous articles, identified by its star trade-mark and by nothing else; the facts which have given the mark its great value; the adjudications sustaining the mark and its registration under the Act of Congress of 1905. It complains that respondent is using this trade-mark in advertisements and on inferior shirts, and declines after protest to discontinue the use. It prays that the respondent be restrained from making use of the representation of a star in connection with shirts not of the appellant's production.

It is to be observed that the bill does not seek to interfere in any way with the respondent's use of anything except the appellant's trade-mark.

The answer in substance denies all the allegations of the bill, and alleges that the respondent's mark is a comet, and that it has been used by the respondent and his predecessors for many years.

The issue is thus a narrow one. It is not whether the use by the respondent of a representation of a comet or the word "comet" should be restrained. The bill does not seek to interfere with that in any way. As pointed out by the Court of first instance "a comet ordinarily has not the visible outline of a star" (R., p. 83). Its use would accomplish everything accomplished by respondent's mark except the destruction of appellant's property. The issue is simply whether the respondent may continue to use the representation of a star—what the Court of first instance calls "defendant's exaggerated point" (p. 83), the Court of Appeals "a solid five-pointed star" (p. 92) and what is in fact nothing more or less than appellant's trade-mark and property.

EED THRU

The Facts.

The facts are comprised within two propositions neither of which has been seriously questioned: (1) For more than half a century the appellant has been the recognized owner of the exclusive right to use any representation of a star in connection with shirts and its business rests solely on that. (2) The respondent is in fact using a representation of a star upon competing shirts.

For years prior to the Civil War (p. 50; p. 55), and ever since, the appellant's shirts have been marked by a star, and identified and known by it, the practice having been from the first to rely upon the mark alone to indicate the genuineness and origin of the article, unaccompanied by the corporate or firm name or address (p. 40), and this manufacture, recognized, bought and sold, throughout the country by nothing but the mark, has during all these years been in great demand and the leading article of its kind in the market (p. 39).

As early as 1872, a decree was entered, by direction of his Honor, Judge SHIPMAN, in the Circuit Court for Southern District of New York, restraining the use by another of a star; and twenty years later a decree was entered in the Circuit Court for the Northern District of Illinois, after a careful opinion, reported in 51 Fed. 829 (p. 69, *et seq.*), which found that the appellant's predecessors were the owners and entitled to the exclusive use of the "star" mark in all its forms, and restrained the defendant from selling shirts bearing,—

> "The device or symbol of a Star, or the word 'Star' "used singly or together, or used singly or together "with the word 'Crescent' or device or symbol of a "crescent, or with any other word or device or symbol "whatever" (p. 70).

This we submit is an accurate definition of the appellant's rights. And if the word "Comet" and the device of dots used by the respondent be substituted for the word "Crescent," and the device of a crescent used by the defendant in the Blumberg case, the decree in that case becomes a decree herein.

The appellant's registration, under the present Act of Congress, is reproduced on page 61 of the record. Its shirt label is reproduced on page 63, and one of its many box labels (all of which bear the mark alone, displayed in different forms), is reproduced on page 62. In the registration, the mark is defined as "the word 'star,' and a representation of a Star, used singly or together." (Page 61.)

Because its business depends peculiarly on the mark alone, the appellant and its predecessors, from the first have been diligent in protecting the property thus defined. They have successfully maintained a great number of suits (p. 42); dealt with other approximators by correspondence (*Ib.*); issued warnings to the trade (p. 73), and in every way successfully protected their property in the mark upon which their business rests.

Shortly before this suit was instituted there appeared in a trade paper, called "The Haberdasher," an advertisement, the whole of which is reproduced on page 64 of the record, in the center of which was displayed the following:—

SHIRTS

The appellant, through its attorneys, thereupon wrote the respondent requesting him to discontinue the use of its trade-mark. Prior to this, the appellant had never heard of the use of any such mark by the respondent (p. 42). It was then introduced to the respondent's stationery, displaying the same

mark above reproduced, in red, the rest of the heading being black, (Complainant's Exhibit, Defendant's Letter Heads, page 65). The respondent having declined to discontinue the use of appellant's mark, the complainant succeeded in finding one of respondent's shirts in Connecticut, and instituted this suit (p. 18). The mark on this shirt is reproduced on page 63 of the record.

The respondent says that he has used his mark for a long time, but this (whatever may be the truth about it) is not material. There is no suggestion of prior, or anticipating use. The appellant had never heard of the respondent's mark until the appearance of the advertisement which led to this suit. As the record and decisions show (pp. 60, 66, 69, 73), the appellant has constantly asserted and defended its property in the use of a star as applied to shirts whenever knowledge of infringement has reached it. The respondent's operations have not been large enough to admit of a suggestion of constructive knowledge by appellant. There is thus no possible room for an imputation of laches.

It may be added that the proof is not that the respondent has used the symbol of a star in his mark for any considerable length of time, although it is immaterial whether he has or not. Two of his witnesses say that the mark formerly used by respondent was a comet with a point formed by nebulous matter, and not by a star or pointed figure (p. 76, p. 78). The statement of the third witness, the respondent, to the contrary, in view of the evasive character of his testimony is not, we think, persuasive. And under the rule established in McLean v. Fleming, 96 U. S., 258, and emphasized in Menendez v. Holt, 128 U. S., 523, and Saxlehner v. Eisner, 179 U. S., 19, the right to injunctive relief would remain even were there laches.

On these facts the appellant respectfully contends that it

DARK PAGE BLE

is a conclusion of law that the injunction sought should issue. That injunction does not in the remotest degree interfere with the use of the word "comet," or the ordinary representation of a comet. It simply prohibits the use of the appellant's property,—a representation of a star, which is essential to the preservation of its rights and business, and leaves the respondent unhampered in his efforts in any direction, other than that which consists in making use of and destroying the reputation of appellant's manufacture.

ED THRU

THE LAW.

The use by the respondent of a representation of a Star (with or without added matter) is unlawful and should be restrained.

The appellant's trade-mark is valuable because it has acquired a meaning in the minds of purchasers, actual and prospective. The conception, idea or recollection by which they are influenced is necessarily not definite. They have many other things to think of. They have never been compelled to discriminate between various expressions of the idea, for they have always been able to rely upon any expression of the idea "Star", whether pictorial or verbal, as guaranteeing genuineness. The appellant for upwards of fifty years has used it in many forms on many differing labels. The necessary result is that any expression of the idea or recollection "Star" would be taken as complainant's mark. The number of points of the star, the accessories used with it and like details, if ever observed, are forgotten. The trade-mark is accordingly accurately defined in the certificate of registration as consisting of "the representation of a Star and the word 'Star', used separately or together." We submit that no one else can lawfully put upon a competing article any representation of a Star.

The Trade-mark Act of February 20th, 1905 (33 U. S. Statutes at Large Part 1, p. 724; U. S. Compiled Statutes Supplement of 1907, p. 1008), provides:

> "SEC. 16. That the registration of a trade-mark under the provisions of this Act shall be *prima facie* evidence of ownership. Any person who shall, without the consent of the owner thereof, reproduce, counterfeit, copy, or colorably imitate any such trade-mark and affix the same to merchandise of substantially the same descriptive properties as those set forth in the registration, or to labels, signs, prints, packages,

wrappers, or receptacles intended to be used upon or in connection with the sale of merchandise of substantially the same descriptive properties as those set forth in such registration, and shall use or shall have used such reproduction, counterfeit, copy or colorable immitation in commerce among the several States * * * shall be liable to an action for damages therefor at the suit of the owner thereof."

Section 19 provides that the courts "vested with jurisdiction of cases arising under the present Act shall have power to grant injunctions, according to the course and principles of equity, to prevent the violation of any right of the owner of a trade-mark registered under this Act."

The purpose of this statute is "to protect" trade-marks. Its interpretation seems plain in the light of the history of the subject. With the improvement of means of transportation came the distribution of goods. Marks of origin readily recognized and remembered upon those goods were the sole means of promoting a competition of excellence between manufacturers whose products were not sold to experts. Without marks of origin, competition in such products would necessarily resolve itself into a competition of imposition depending upon the superficial appearance of each anonymous article, with the reward to him who could give to the cheapest and most inferior the most fictitious appearance. By the protection of marks of origin alone is there secured a competition of excellence and energy depending on reputation, with the reward to him who by fair dealing induces purchasers to seek his goods because of their merit and his good name.

Marks of origin have, accordingly, been protected in one way or another since the distribution of goods began. And as the distribution of goods increased and the desirability of encouraging investments in industries based on excellence became more apparent and the temptation and tendency towards piracy became more marked, the law evolved the stringent rule,

which is enunciated in the statute, that a trade-mark is property to be protected as such.

The right recognized in the registrant is that of "ownership." The appellant owns, for purposes of use in connection with shirts, any expression of a star, verbal or pictorial. The violation condemned is the use of a "copy or colorable imitation" of a "representation of a star" either affixed to shirts or to signs or prints "intended to be used * * * in connection with the sale of" shirts.

The respondent is using "affixed" to his shirts and in advertisements "intended to be used in connection with the sale" of them that very thing, to wit, "a representation of a star." He may be using other things as well, but there is nothing in the statute or law which makes the use of other things in connection with the appropriated property a justification of the appropriation.

It has been accurately said that the action to restrain the use of a trade-mark "is in reality a specialized variety of the action" to prevent unfair competition, "having been divided off when property in a trade-mark was first adopted as the ground of jurisdiction" (Kerly, Trade-Marks, 4th Ed., p. 354).

The reason for this specialization may have been in part the necessity for providing a more certain and workable rule than the rule in actions of deceit, which like the rule prohibiting unfair competition is in its operation necessarily uncertain and in its application necessarily expensive and slow; and thus the encouragement of industry and excellence by holding out the certainty of adequate reward and the discouragement of experiments in the direction of fraud and commercial piracy.

In every relation in the law fundamental considerations of right and policy are by experience crystallized into fixed

rules, the adherence to which is essential to the correction of the evil at which the law aims. The trespasser in a particular instance may not injure my land, but it is none the less important that the rule that the trespass is unlawful should be applied. And so, long ago, in a trial *at law* for the infringement of a trade-mark where it was shown that no damage was occasioned, we find the Court saying: "If it occasioned him no specific damage, it was still to a certain extent an injury to his right" (Blofield vs. Payne, 4 Barn. & Adol., 410).

The appellant is seeking protection not against one infringer alone but against a class of manufacturers and dealers all over the country who have in the past constantly sought to avail themselves of the reputation of its goods and stand ready at all times to filch the demand it has created for them. If the conclusion of the Courts below is right, the appellant has no effective right to be protected against such infringers, because "the right of individual appropriation once lost is gone forever" (Saxlehner vs. Eisner, 179 U. S., 36).

This is true practically as well as legally. If this respondent may use appellant's trade-mark by adding some accessories, others may do likewise, with the inevitable result that something more than a representation of a star will be necessary to separate appellant's goods from others, whereby the practical value of its trade-mark is destroyed as certainly as its legal property right therein.

The important difference between cases relating to unfair competition and cases relating to technical trade-marks is well settled.

Lawrence Mfg. Co. vs. Tennessee Mfg. Co., 138 U. S., 537.

Elgin National Watch Co. vs. Illinois Watch Co., 179 U. S., 665.

In a case of unfair competition the law directs that the manner of use of what is *public juris* be fair ; in the case of a techinal trade-mark the law prevents the use by others of what is the exclusive property of one person. In the former the consequences of the defendant's acts require examination ; in the case of a technical trade-mark, " the fact of its use by another creates a cause of action " (179 U. S., 665, 677).

In Lawrence Man. Co. vs. Tenn. Man. Co., 138 U. S., 537–548, the Court say :

> " The jurisdiction to restrain the use of a trade-mark rests upon the ground of the plaintiff's PROPERTY in it, and of the defendant's unlawful use thereof (Boston Diatite Co. v. Florence Manufacturing Co., 114 Mass., 69). If THE ABSOLUTE RIGHT belonged to plaintiff, then, if an infringement were clearly shown, the fraudulent intent would be inferred, and, if allowed to be rebutted in exemption of damages, the further violation of THE RIGHT OF PROPERTY would nevertheless be restrained (McLean v. Fleming, 96 U. S., 245 ; Menendez v. Holt, 128 U. S., 514)."

The same fixed rule had been recognized without variation in all the cases which have come before this Court and directly applied in Menendez v. Holt, 128 U. S., 514.

In Elgin v. Illinois, 179 U. S., 665, the Court points out the essential differences between a case involving a technical trade-mark and a case of unfair competition saying in substance that in the case of a technical trade-mark " THE FACT OF ITS USE BY ANOTHER creates a cause of action," whereas in a case of unfair competition the mere use of the word will not be restrained but " THE USE OF THE WORD BY OTHERS IN SUCH A WAY AS TO AMOUNT TO A FRAUD on the public." Throughout its opinion the Court speaks of the right to a trade-mark as " an absolute right " (179 U. S., 684–677) and a trade-mark as something

which "can lawfully be withdrawn from common use" (p. 677). And the Court repeats the rule which we invoke:

> "If a plaintiff has THE ABSOLUTE RIGHT TO THE USE of a particular word or words as a trade-mark, then, if an infringement is shown, the wrongful or fraudulent intent is presumed, and, although allowed to be rebutted in exemption of damages, the further violation of the RIGHT OF PROPERTY will nevertheless be restrained."

Any number of illustrations of applications of the rule might be cited. For example the case of Enoch Morgan's Sons Co. v. Ward (152 Fed. 690, 81 C. C. A. 616, 12 L. R. A. (N. S.) 729) was a case wherein the packages and accessories were as different as it would be possible with the display of the utmost ingenuity to formulate. One was a square cake in tin-foil with a blue band around it; the other a powder in a large cylindrical yellow package with red lettering. The Court of Appeals, reversing the Court below, which declined to grant relief because of the improbability of confusion, said:

> "Also, a manufacturer may put forth his goods in a distinctive or in a common dress and may rely upon building up a good-will by associating in the public mind his product with an invented word or symbol which he has the exclusive right of use. HIS RIGHT TO EXCLUDE, if a further analogy to the patent law may be drawn, IS LIKE THAT OF THE PRIMARY INVENTOR WHO PRODUCES A NEW INTERGER IN THE USEFUL ARTS. In such a case, a commercial pirate should not be permitted to escape the charge of infringement by putting a different dress on a competing article he is offering in association with the invented word or symbol. 'The jurisdiction to restrain the use of a trade-mark rests upon the ground of the plaintiff's property in it, and of the defendant's unlawful use thereof.' Lawrence Mfg. Co. v. Tenn. Mfg. Co., 138 U. S., 537, 11 Sup. Ct. 396, 34 L. Ed.,

> 997. If a word or symbol is of a character to be appropriated, and if it has been duly appropriated as a trade-mark, *it becomes property; and* A COMPETITOR'S USE THEREOF, EITHER ALONE OR IN CONNECTION WITH MATTER TO WHICH ITS OWNER LAYS NO CLAIM, WITHOUT THE OWNER'S CONSENT, CANNOT BE LAWFUL" (p. 692).

In this connection the case of Liggett & Meyers Tobacco Co. v. Finzer, 128 U. S. 182, should be mentioned. In that case the complainant alleged that it was the first to adopt and and use a star as a trade-mark for tobacco and sought to restrain the use of a different star by the defendant, The first point which the Court considered was whether the representation of a star was the mark which distinguished the complainant's goods from others. It said :

> " Upon the first of these two points the testimony establishes the fact that the complainant was the first person to use a star made of tin and fastened upon plug tobacco, as described above, but that *he was not the first person to use the design of a star* upon plug tobacco. The priority of use, therefore, by the complainant extended *only to the tin star* and *not to the design of a star* generally" (128 U. S., 183-4).

The Court having thus found that the complainant's property right was limited to a particular kind of a star and did not extend to "a star generally" and finding that the defendant used a different kind of a star and so was not trespassing upon the property right, considered the question as to the probability of confusion. The obvious implication is that had it found that the complainant's priority of use extended to " the design of a star generally" the defendant would have been enjoined as of course. In the case at bar there can be no question concerning appellant's right to a star generally.

The same rule which is essential to the fulfillment of the purposes of the law prevails in England, where it was recently

said by the Court of Appeals in Faulder & Co. v. Rushton, Ltd., 20 R. P. C., 477–495:

> "I am, I hope, fully alive to the distinction between an action founded on a trade-mark and an action founded not on property but on a passing-off of goods. The relief given in one case differs from the relief given in the other. If 'Silver Pan' were a registered trade-mark the defendants would be restrained from using it *even if nobody had ever been deceived by it or ever could be deceived by it.*"

This well-settled rule implies that the use of other things in connection with the mark is immaterial. The use of another's property cannot be justified by showing that there has also been a use of things not his property. (Bass etc. Co. v. Feigenspan, 96 Fed. 206). It is not, we think, proper in a case of this kind to speculate in any way concerning consequences. The fact of use is alone important. But it may be said that, because it impairs the individuality and recognizability of the mark, the use of it by others with attachments or accessories is apt to work eventually more serious injury than a robust counterfeit—in the same way that the destruction of the value of any other property is more serious than the pilfering of some of the returns it yields.

To apply this rule to the case at bar is to decide that, whatever may be true of the ordinary representation of a comet which includes no star or the word "comet" the use of the respondent's "exaggerated point" is unlawful, not because one may or may not conjecture that it may deceive the public, but precisely because it is an unauthorized appropriation and destruction of appellant's property.

The fact that some of the forms of infringement appear in advertisements and letter-heads is not important because the use of another's trade-mark in advertising is as inimicable to the preservation of his rights and

business and as illegal as its use on the article itself. As lucidly stated in Jay v. Ladler, 6 R. P. C., 136–139:

> "A man is not entitled—whether in trade or out of trade—to take that which is another man's, and when a man in trade advertises his goods as being the goods of another person, he is doing that which is wrong in itself, and liable to injunction in this court. * * *
>
> "He is not entitled to do that: If he does it, he is liable to be restrained, and if he does that in any way, whether by saying it in so many words, or by advertising what is known as the mark or symbol of his rival—however he does it—he is still liable to be restrained, and the court is not, and never has been, and I hope, never will be, astute to find differences which will allow a man to evade the general law" (p. 56).
>
> Walter Baker & Co. v. Slack, 130 Fed., 514–519; 65 C. C. A., 138.

This, like the rule that a technical trade-mark is the property of its owner, is recognized in the Trade-mark Act, which condemns adverse use in "signs * * * intended to be used * * * in connection with the sale of merchandise of substantially the same descriptive properties."

In the present instance the respondent is using his "exaggerated point" in his advertisements branded distinctly "trade-mark" (p. 95). There is no question of use as a decoration. It is a case of direct appropriation and use of "that which is another man's."

The respondent is in fact using and destroying a property of the utmost value belonging to the appellant. He ought to be restrained from doing just that; and that is all the injunction prayed restrains.

The accounting would not be worth the time it would consume and may be taken as waived.

We respectfully submit that the decree should be reversed with directions to enter a decree for an injunction as prayed in the bill of complaint.

The Right of Appeal to this Court.

In view of the fact that (so far as we know) this is the first appeal based on the fact that the jurisdiction of the Circuit Court was founded on that particular law of the United States approved February 20, 1905, a few words should, perhaps, be added as to this appeal.

The right of the appellant to this appeal depends upon the Judiciary Act of March 3d, 1891, c. 517, 26 Stat. 826, and the Trade-Mark Act of February 20, 1905, 33 U. S. Statutes at Large, part 1, p. 724; U. S. Compiled Statutes Supplement of 1907, p. 1008.

The Judiciary Act of March 3d, 1891, provides "for the distribution of the entire Appellate jurisdiction of our national judiciary system" (McLish v. Roff, 141 U. S. 661; Macfadden v. United States, 213 U. S. 288). The Act and the decisions of this Court interpreting it seem to make plain that an appeal lies from the Court of Appeals to this Court in all cases except those wherein an appeal lies to this Court direct from the Court of first instance and those wherein the decision of the Court of Appeals is expressly made final. That right of appeal is not to be defeated by implication but exists unless the decision of the Court of Appeals is "made final in terms" (144 U. S., 57).

Press Publishing Co. v. Monroe, 164 U. S. 105;
Werner v. Searle Hereth Co., 191 U. S. 195, 205;
Lau Ow Bew v. United States, 144 U. S. 47.

The Judiciary Act of March 3d, 1891, applies equally to laws of the United States enacted before and after March 3d, 1891.

Spreckles Sugar Refining Co. v. McClain, 192 U. S., 397.
Lau Ow Bew v. United States, *supra*.

Under the Judiciary Act the Court of Appeals had appellate jurisdiction in the case at bar and an appeal could be taken to this Court, because the jurisdiction of the Circuit Court rested on a law of the United States and the case was accordingly not a case in which the judgment of the Court of Appeals is "made final in terms" (144 U. S. 57), but a case "not expressly made final by the section" *(ib.)*.

The Trade-Mark Act of 1905 is in no way inconsistent with the Judiciary Act of 1891 and does not make the decision of the Court of Appeals final. The provision as to the jurisdiction of Courts in the Trade-Mark Act was enacted following the Judiciary Act which contained words "manifestly inserted out of abundant caution in order that any qualification of the jurisdiction by contemporaneous or subsequent acts should not be construed as taking it away, except when expressly so provided. Implied repeals were intended to be thereby guarded against" (Lau Ow Bew v. U. S., 144 U. S. 56).

With this before it Congress carefully avoided making the decision of the Court of Appeals final in Trade-mark cases, as will be seen by comparing the words of the Judiciary Act and the Trade-Mark Act. The Judiciary Act of 1891 uses the words:

> "That the Circuit Court of Appeals * * * shall exercise appellate jurisdiction * * * and the judgments or decrees of the Circuit Courts of Appeal shall be final in * * *"

The Trade-mark Act provides that the Circuit and Territorial Courts shall have jurisdiction and the Circuit Court of Appeals

> "shall have appellate jurisdiction in all suits at law or in equity regarding trade-marks registered under this Act."

There is nothing inconsistent. There is nothing making the decision of the Circuit Court of Appeals final. And it would seem that Congress took pains to leave the right of appeal to this court untouched.

The Trade-mark Act of 1905 also provides in Section 18 that writs of *certiorari* may be granted by this court "for the review of cases arising under this Act in the same manner as provided for patent cases by the court creating the Circuit Court of Appeals." This is not inconsistent with the right of appeal and is not unnecessary. The right of appeal to this court is limited by the Judiciary Act to causes in which the amount involved exceeds one thousand dollars. The provision for *certiorari* in cases under the trade-mark law applies regardless of the amount of the controversy.

Thus the Judiciary Act and the Trade-mark Act together arrange matters so that in cases involving less than one thousand dollars (and perhaps before final decision in other cases) a petition for *certiorari* is the proper course and in cases involving more than one thousand dollars an appeal may be taken as of right from the decision of the Court of Appeals, because the jurisdiction of the Circuit Court rests upon a law of the United States and the decision of the Court of Appeals is not made final.

That the amount involved in the present case exceeds one thousand dollars is deducible from the record, but to avoid the necessity of considering that the appellant respectfully files an affidavit to that effect, following the practice approved in

Course *et al.* vs. Stead *et Ux.*, 4 Dallas, 22 (1 Curtis 319).
The Gracc Girdler, 6 Wall., 441.
Parker vs. Morrill, 106 U. S., 1.
Johnson vs. Wilkins, 116 U. S., 392.
Wilson vs. Blair, 119 U. S., 387.
Glacier, etc. Co. vs. Willis, 127 U. S., 471.

The decision below ought to be reversed with instructions to enter a decree for an injunction restraining the use by the respondent of appellant's trade-mark.

Respectfully submitted,

ARCHIBALD COX,
Counsel for Appellant.

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Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 182.

HUTCHINSON, PIERCE & COMPANY,
Appellant,
vs.
JOSEPH LOEWY.
} No. 237.

APPELLEE'S BRIEF.

The suit here on appeal is admittedly brought under the act of Congress approved February 20, 1905, affecting trade-marks as appears by the petition for appeal to this Court upon page 93 of the transcript of record.

Such being the case the suit is, of course, governed by the statute which at sections 17 and 18 reads as follows:

> "Sec. 17. That the circuit and territorial courts of the United States and the supreme court of the District of Columbia shall have original jurisdiction, and the circuit courts of appeal of the United States and the court of appeals of the District of Columbia shall have appellate jurisdiction of all suits at law or in equity respecting trade-marks registered in accordance with the provisions of this act, arising under the present act, without regard to the amount in controversy.
>
> "Sec. 18. That writs of certiorari may be granted by the Supreme Court of the United

> States for the review of cases arising under this act in the same manner as provided for patent cases by the act creating the circuit court of appeals."

Section 17, which places the appellate jurisdiction in the courts of appeal does not specifically prohibit appeals from the Court of Appeals to this court, but Section 18 provides for review by this Court of the action of the courts of appeal by certiorari "as provided for patent cases by the act creating a circuit court of appeals."

It is believed that the provision just quoted from Sec. 18 is such as to make the court of appeals final and that under such statute no appeal is allowed to this court. The contention, therefore, is that the present appeal is in this court without authority of law and should be summarily dismissed without hearing upon the merits. It is not deemed necessary to quote from the act of Congress of March 3, 1891, as amended February 19, 1907, establishing the Court of Appeals with final jurisdiction in patent cases. It is believed that the trade-mark act above quoted from, places suits brought under such trade-mark act plainly within the scope of the act establishing the Court of Appeals and that in view of such several acts of Congress matters heard relative to trade-marks in the Court of Appeals can be reviewed in this court only upon certiorari unless this court sees fit to depart from its present practice in the matter.

In view of the possibility, however, that the court may retain jurisdiction and consider the appeal on its merits it is deemed advisable to enter into a discussion of the merits of the case.

The action was brought by the plaintiff both for infringement of trade-mark, as appears by folios 3 to 7 of the transcript of record, and for unfair competition, as appears by folios 8 to 10 of such transcript. It was also

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an action for profits of the defendant and damages of the plaintiff as well as for injunction.

The plaintiff has not introduced any testimony to show that its business or trade has in any way been interfered with by any sales made lawfully or unlawfully by the defendant, nor has any testimony been introduced to show that defendant has sold any goods whatever in competition with the goods of plaintiff either with or without the mark of plaintiff. Such being the case the allegation of unfair competition and the action for profits from the defendant and damages of the plaintiff must of necessity fall. To substantiate a claim of unfair competition it is of course necessary to prove competing sales, and without such proof the action is reduced to a simple action for infringement of trade-mark. Even in cases brought for infringement of trade-mark, proof of confusion by reason of the use of such mark is necessary unless the marks are identical or so nearly identical as to leave no doubt in the mind of the court as to the similarity or the probability of conflict and confusion.

The decision of the Court of Appeals of the Second Circuit from which this appeal is taken is to the effect that in view of the parties to the suit being residents of the same State, to wit, New York, they could consider only the question of infringement of trade-mark as provided in the act of February 20, 1905, giving the Federal courts jurisdiction over trade-mark matters and could not consider the question of unfair competition at common law as they had no jurisdiction of the parties for that purpose.

It is not thought necessary to cite any authorities on this question as the testimony of the parties clearly shows that there is no diversity of citizenship consequently the Federal courts can acquire only such jurisdiction as is

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specifically conferred upon the courts by statute and as the jurisdiction of unfair competition has never been so conferred the courts can have no jurisdiction of such subject matter.

The present appeal is taken on the theory that the plaintiff is entitled to the exclusive use of a star no matter in what connection it is found, or coupled with what accessories, and a number of decisions were cited by plaintiff's counsel before both the lower courts to substantiate that contention. The decisions cited by plaintiff, in which it or its predecessors were parties, have invariably accorded to plaintiff or its predecessors the exclusive use of the mark "Star" as a trade-mark for shirts, and in some of the cases cited have gone so far as to enjoin the use of stars in association with other features. The contention, however, that they are entitled to the exclusive use of a star, no matter in what connection or association it is used, is thought to be met in the following illustration:

The above cut shows a star, and it is believed that the star is fully as much in evidence as the star in Loewy's trade-mark seen hereinafter. As a further illustration of the use of a star the following cut is also submitted for inspection:

Again a star is shown, but in both of the cuts above the star is shown with other features and accessories, and with names applied thereto clearly differentiating and further clearly indicating that there is no claim of the word "Star," either as spelled by its letters or as used by the public by reason of a star being illustrated. No contention is made that plaintiff is not entitled to the exclusive use of a **star** as a trade-mark for shirts or to prevent the use of a star for like goods, provided it is such a star as is liable to confuse the public or to lead purchasers to believe that they are securing

the goods of plaintiff when they are in fact buying the goods of another. No contention is made either, that in case the marks are so similar as to cause confusion, defendant might not be estopped from using his trademark even though no proof was brought as to actual confusion. It has been held that these marks are not so similar as to be likely to cause confusion by tribunals other than the courts below in this case. A cancellation proceeding was begun in the United States Patent Office by Hutchinson, Pierce & Co., the appellant herein, to cancel the registration of Loewy, the defendant herein, for the comet, which forms the contention in the present appeal and the decision of the Examiner of Interferences was to the effect that there was no such similarity as was likely to cause confusion, nor evidence of confusion, and the petition for cancellation was dismissed. Appeal was taken to the Commissioner in person and was heard by the Assistant Commissioner. The Assistant Commissioner affirmed the Exeminer of Interferences and his opinion will be cited later herein.

In Delaware & Hudson Canal Co. v. Clark, 13 Wall., 311 (L. Ed., 518), this court said:

> "In all cases where rights to exclusive use of a trade-mark are invaded, it is invariably held that the essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another, and that it is only when this false representation is directly or indirectly made that the party who appeals to a Court of Equity can have relief. This is the doctrine of all authorities."

In Paul on Trade-Marks, Section 24, we find the rule laid down as follows:

> "As in cases of trade-mark, so in cases of unfair

competition in business, imposition upon the public is a necessary constituent of the plaintiff's title to sue, but only in the fact that it is the test of the invasion of the plaintiff's rights by the defendant. As in one, so in the other, the object and purpose of the law is, first, to secure to him who has been instrumental in bringing into market a superior article of merchandise the fruit of his industry and skill, and, secondly, to protect the community from imposition. As in one, so in the other, the underlying principle is that one man is not to sell his goods under pretense that they are the goods of another; and, as in one, so in the other, the violator of another's rights pirates upon the good will of that other's friends and customers, or the patrons of his trade and business, by sailing under his flag without his authority or consent. There is this difference, however, the law of trade-marks is designed to protect primarily a property right, and, as incidental thereto, gives redress for the injuries resulting from invasions of that right, a distinct, technical trade-mark being in itself evidence when wrongfully used, of an illegal act, while the jurisdiction exercised over cases of unfair competition in business is grounded in the prevention of fraud. Fraudulent intention is not a necessary ingredient of a pure trade-mark case, as an invasion of another's trade-mark may be the result of accident or of a misunderstanding, although it may be and probably is true that in the majority of cases fraud is an element of trade-mark cases in awarding damages and costs."

The test referred to in the above quotation is such as is employed in trade-mark cases, as distinguished from cases of unfair competition, and the proof of confusion is not for the purpose of proving damages, but simply as a test, as stated by the author, to convince the court

that infringement exists, which may not be determinable by a simple inspection of the marks. In the present instance, however, the test required, to wit, **the proof of confusion has been entirely omitted** and the two marks are of necessity submitted to the court for inspection, the testimony amounting practically to nothing but proof of the use of the two marks by the parties which has not been denied by defendant.

In the plaintiff's record the testimony of Joseph Loewy on behalf of the plaintiff is found, and being a witness for the plaintiff the plaintiff is, of course, bound by such testimony, although the witness is in fact the defendant. At folio 42 of the transcript of record is found the following:

> "X-Q. 91. Did you ever apply the word 'Star' to any shirts made by you? A. Never did. Never had any reasons. At folio 43, X-Q. 112. Did you always use the word 'Comet' in connection with the representation of a comet on shirts made and sold by you? A. Yes, sir. At folio 44, X-Q. 114. Did you ever use the word 'Star' or representation of a star on a shirt made and sold by you? A. Never did."

Plaintiff seeks to establish the fact that defendant has used the trade-mark "Star" on shirts manufactured by him, but its own witness, Joseph Loewy, denies that such had ever been the case, and that in addition to employing the symbol of a comet upon the goods the defendant has invariably also employed the word "Comet."

In the testimony introduced on behalf of defendant appears the deposition of William J. Wilkinson, who is a buyer for the department store of John McCormick, of Brooklyn, and to the effect that shirts bearing the regis-

tered trade-mark of the plaintiff, No. 51,146, and other shirts bearing the registered trade-mark of defendant, No. 56,102, and the subject of this cause are sold at the establishment of John McCormick, and that there has never been any confusion or misrepresentation practiced on the public, and to his knowledge no shirts have ever been purchased at that establishment bearing the mark of the defendant, believing them to be the manufacture of the party complainant. This testimony is the only testimony introduced positively to the effect that shirts bearing the two marks are sold from the same establishment and without confusion, but as it is unrebutted it must stand as the only testimony on the subject and is directly opposed to actual confusion.

In McLean v. Fleming, 6 Otto, 245, 24 Law Ed., 832, this court says:

> "Colorable imitation which requires careful inspection to distinguish the spurious trade-mark from the genuine is sufficient to maintain the issue; but a court of equity will not interfere when ordinary attention by the purchaser of the article would enable him at once to discriminate the one from the other. When the similarity is sufficient to convey a false impression to the public mind and is of a character to misrepresent and deceive the ordinary purchaser in the exercise of ordinary care and caution in such matters, it is sufficient to give the injured party a right to redress if he has been guilty of no laches."

Quoting with approval Manufacturing Co. v. Spear, 2 Sandf., 599, Coddington Dig., 109; McAndrew v. Bassett, 4 DeG. J. & S., 380.

In Kann et al, v. Diamond Steel Co. et al., 89 Fed. Rep., 706, The trade-marks in question consisted in one

case of the outlined form of a diamond or lozenge in connection with the words "Crushed Steel," and in the other case consisted of a "radiant diamond" combined with the words "Diamond Steel No. 1." In disposing of the case Judge Sanborn presented the opinion of the Court, as follows:

> "**Every suit of this character is founded on the fact that the action, or the proposed action, of the defendant has deceived, or is calculated to deceive, ordinary purchasers buying with usual care, so that they have purchased, or will probably purchase, the goods of the defendant under the mistaken belief that they are those of the complainant, to the serious damage of the latter.** The deceit, or probable deceit of the ordinary purchaser to such an extent that he buys, or will probably buy, the property of one manufacturer or vendor in the belief that they are those of another, is a *sine qua none* of the maintenance of such a suit, because every one has the undoubted right to sell his own goods, or goods of his own manufacture, as such, however, much such sales may diminish or injure the business of his competitors. * * * At present it is sufficient to say that in all cases where a trademark is imitated, the essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another, and it is only when this false representation is directly or indirectly made, and only to the extent to which it is made, that the party who appeals to the justice of the court can have a title to relief. * * *
>
> "The burden was on the appellant to show that the use of the symbol and words which marked the German product were calculated to deceive ordinary purchasers and to create confusion in the trade. It was open to it to do this by evidence

that the use had actually done so, or by the ocular demonstration of a comparison of the symbols and words which marked the packages in which the two products were offered for sale. It produced no proof of actual deception and thus left the question whether or not the dress in which the German product is clothed is calculated to deceive the ordinary purchaser, to the arbitrament of the eyes. When they are turned upon the two trade-marks, either simultaneously or successively, the general impression is one of difference and dissimilarity. It is true that the one bears a diamond-shaped figure, and the other the picture of a radiant diamond, but, to the eyes, these present little likeness. It is not by the visual perception, but only through the mental suggestion, that both pictures represent a diamond, and that things which are equal to another are equal to each other, that the hint of likeness is reached, and this is the only suggestion of similarity the two trade-marks contain. It is at least doubtful whether the thought that the two devices represent a diamond, and that therefore, they must represent the product of the same manufacturer, would ever occur to the ordinary purchaser in the busy marts of trade. He probably recognizes the goods he seeks to buy by the visual impression of the device upon the product, rather than by the name of the thing whose picture is impressed. The pregnant fact that the appellant sold its goods marked with its diamond-shaped figure for more than five years before the German product was introduced, and yet neither the appellant nor any of its customers called it 'Diamond Steel,' or used the word 'Diamond' in connection with its sale, lends strong support to this probability. * * * If, through the use of the symbol [here follows sketch of diamond-shaped figure], the abradant manufactured by the appellant had become known to the

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> trade as 'Diamond Steel,' 'Rhombus Steel,' or 'Lozenge Steel,' no court would hesitate to restrain a defendant from using any word or device which would cause the article he offered to be called by the same name as the appellant's because such an act would tend to deceive purchasers, and to create confusion in the trade. * * * The use of the word 'Diamond,' and the picture of a radiant diamond, had no element of deception in it, and therefore furnished no ground for the relief sought by the bill. * * * Whatever may have been the intention of Robert J. Marx and the appellees in adopting and using their trade-mark, it does not sufficiently resemble that of the appellant to mislead purchasers or to convey a false impression to the public. **There is no evidence in the record that the appellant has ever suffered any injury from any deception caused by it, and there is no probability that it ever will.** Such a case presents no ground for relief, either at law or in equity."

In the Liggett & Myers Tobacco Co. v. Rudolph Finzer, 128 U. S., 182 (L. Ed. 396), the subject in controversy is stated in the quotation here given, together with the holding of the court in that relation:

> "Upon the second of the two points there is even less ground to sustain the position of the complainant. The two stars, the one used by the plaintiff and the one by the defendant, are so different in form and surroundings that it would not be possible for any person not afflicted with color blindness to mistake the one for the other. They differ in size and color. The star used by the complainant on its manufactured goods is a little over one-half inch in diameter with a hole in the center. The mark used by the defendant consists

of a round paper label over three-fourths of an inch in diameter with a red star and the word 'Trade' on one side and the word 'Mark' on the other in gilded letters on a red background and having beneath the star the word 'Light,' thus forming by the figure and the letters the word 'Starlight.' One star has the silvery appearance of tin foil, the other has a glare of red and yellow-gilded background. The judgment of the eye upon the two is more satisfactory than evidence from any other source as to the possibility of parties being misled so as to have one mistaken for the other; and this judgment is against any such possibility. Seeing in such case is believing; existing differences being at once perceived and remaining in the mind of the observer. **There is no evidence that anyone was misled by the alleged resemblance between the two designs."**

As in the case just above quoted, so in the case under consideration; there is a great difference in the size of the two marks, as shown in the illustrations, photolithographic copies of which are appended hereto. In the marks as registered, the greatest dimension of the head of defendant's comet is practically seven-sixteenths of an inch, while the greatest dimension of the plaintiff's **star** is one and one-fourth inches.

There has been introduced in the evidence no sample or exhibit showing the mark used by defendant and forming the subject of this proceeding, but the head of the defendant's **comet,** as actually used upon the goods is five-sixteenths of an inch in greatest dimension, while the **star** employed by plaintiff upon its goods measures three-fourths of an inch in greatest dimension. The head of defendant's **comet** exhibits five points and is a solid body, while the **star** employed by plaintiff

exhibits six points and is simply an outline of a **star,** as would be produced by superposing one triangle upon another. The head of defendant's **comet** is also accompanied by a tail shown in the registration as one and one-half inches long, the mark as registered being larger than the mark as ordinarily employed upon the goods.

Plaintiff introduced into evidence a shirt and attempted to prove that the shirt so introduced was manufactured by the defendant. The shirt mentioned was introduced in the testimony of F. W. Stearns, and the offer appears on page 18, folios 27 and 28 of transcript of record, while on page 63 appears an alleged reproduction of the mark upon such exhibit.

It will be noted from an examination of the record, page 1, that the present suit was begun on May 14, 1906, and the shirt introduced in evidence was purchased by the witness, F. W. Stearns, on June 28, 1906, Qs. 26-28, page 18 of transcript of record. This shirt was, therefore, purchased approximately six weeks after the beginning of the action, and any attempt to hold defendant for an infringement committed after the commencement for the suit is, of course, simply laughable.

Furthermore, the testimony of Stearns, Q. 29, page 8, as to the occurrence at the time of purchase of the shirt shows conclusively that upon one occasion at least the **comet** goods were **not** sold as **star** goods as the testimony of the witness as to such occurrence is to the effect that "the girl hesitated and said she didn't know that she had a 'star shirt.' I said, you have got a shirt hanging in the window with a star on it. Oh, yes, she said, we can sell you one of those," which shows conclusively that the "Comet" shirts were not sold as "Star" shirts but that they would sell "one of those in the window."

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In the testimony of Loewy, produced on behalf of plaintiff, an attempt was made to prove the exhibit, Complainant's Exhibit Defendant's Shirt, just referred to, as one manufactured by the defendant, but such attempt absolutely failed as the witness positively refused to identify the shirt as of the manufacture of the defendant stating, however, that both the shirt and mark were similar to the mark employed and shirt manufactured by defendant.

There was also an attempt made to introduce into the evidence of plaintiff, an advertisement said to have been clipped from the "Haberdasher," but **no trade mark was introduced as actually used upon the goods.** That the Honorable Court may have properly before it the mark as employed by the defendant **we have attached two of the marks as actually employed upon the goods by the defendant,** one showing the mark woven in red; the other showing the mark stamped upon the label in black, as follows:

The complainant introduced into its testimony an exhibit showing its **star** as actually used upon the goods so the court by reference to the above samples will have opportunity to compare the trade-mark as employed by defendant with the trade-mark as actually employed by complainant.

Introduced into the testimony of the complainant was also a box label showing the employment of their **star,**

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and so that the court may have also before it the box label employed by defendant, one of the said labels is appended hereto, appearing at the back of this brief. It is contended that the two marks in controversy in this case are far more dissimilar than were the **two stars** in controversy in the case of Leggett et al. v. Fenzer *supra*.

The labels of defendant are inserted here not for the purpose of bolstering up the testimony of the complainant (in not introducing such labels as actually used upon the goods), but to place fully and fairly before the court the marks of defendant, in the use of which he has nothing to conceal.

In the Court of Appeals for the second circuit in N. K. Fairbank Co. v. R. W. Bell Mfg. Co., 77 Fed. Rep., 869, the controversy arose over the well known "Gold Dust" package and a package of soap powder put up by R. W. Bell Co. called "Buffalo Soap Powder" in packages of similar size and general appearance, but in that case the court held that the dissimilarity was so marked that the public would not be likely to be deceived and held that there was no infringement.

Indeed, at circuit it has been held in Galena-Signal Oil Co. v. W. P. Fuller & Co., 142 Fed. Rep., 1002, that a representation of a star cannot by its own meaning indicate the origin or ownership of such an article as lubricating oil, nor in view of its general use as a symbol can it be appropriated as a trade-mark except in connection with other devices or words such as to render the whole characteristic; and in this case the Court said:

> **"It does not appear from the affidavits in support of the complaint that the defendant has sold or placed upon the market any of its product as and for the product of the complain-**

ant. No one appears to have been deceived by the defendant's trade-mark into purchasing its lubricating oils in the belief that he was purchasing lubricating oils produced by the complainants. **It is not alleged, and no fact is stated justifying the inference, that there has been any false or deceitful representations or unfair dealing on the part of the defendant, or that it has had any fraudulent intent in the use of its trade-mark in the identification of its own goods. There is, therefore, lacking in this case the element of unfair competition in trade which is generally the essence of the wrong that brings the complainant into a court of equity for relief against the infringement of a trade-mark.** * * * The action is limited to the charge that the defendant has infringed a technical trade-mark in violation of a right of property wherein the fraudulent intent is presumed. The object of the suit is to restrain a further violation of the alleged right of property. * * *

"This issue makes it necessary to consider the nature of a trade-mark. What is it? It has been determined that to acquire the right to the exclusive use of a name, device or symbol as a trade-mark, it must appear that it was adopted for the purpose of identifying the origin or ownership of the article to which it is attached, or that such trade-mark must point distinctly, either by itself or by association, to the origin, manufacture, or ownership of the article on which it is stamped. It must be designed, as its primary object and purpose, to indicate the owner or producer of the commodity, and to distinguish it from like articles manufactured by others. Columbia Mill Co. v. Alcorn, 150 U. S., 460, 463; 14 Sup. Ct., 151; 37 L. Ed., 1144. It is manifest that the symbol or representation of a star cannot by its own mean-

ing indicate the origin or ownership of such an article as oil. It can only then be by association that its origin or ownership can be so indicated. **But the representation of a star is a familiar symbol, and can be found in every character of business and associated with all kinds of products and goods. Standing alone, it is not sufficiently distinctive to answer the requirements of a trade-mark, for the reason that it has been adopted by many manufacturers and producers for all kinds of articles. It can be found all through the Patent Office Gazette, but always in connection with some other mark or device to indicate origin or ownership.** The symbol or device which one is at liberty to affix to a product of his own manufacture as a trade-mark must be one not previously appropriated, and which will distinguish the article from one of the same general nature manufactured or sold by others. * * *

"The evidence introduced before the Commissioner of Patents in the interference case shows that this particular trade-mark was not used on the packages of oil sent out by the complainant or its predecessors before December, 1899. The evidence on the part of the defendant shows that the six-pointed star, with the words, 'Extra Star' above, had been in use by the defendant and its predecessors since 1878, or for more than 20 years prior to the time complainant used the same trade-mark on its goods. The trade-mark used by the complainant on its goods prior to 1899 was the five-pointed star, with the words 'Galena' above and 'Oil' below and the letter 'G' in the center. This trade-mark the Commissioner of Patents held was substantially the same as defendant's six-pointed star, with the words 'Extra Star' above. In this view, as before stated, I do not concur. But I hold that defendant's six-pointed star, with the words 'Extra Star' above, is not

> calculated to induce any one buying defendant's goods into the belief that such person is buying complainant's goods with the trade-mark of the five-pointed star, with the words 'Galena' above and 'Oil' below, and the letter 'G' in the center. In support of this view, it is somewhat significant that these two trade-marks were not brought into conflict until 1902. The partial explanation is that complainant was selling its lubricating oils in the Eastern States and exporting them to Europe, while the defendant was selling its lubricating oils in the Western States and exporting them to the Hawaiian Islands and Australia. It further appears that the complainant and its predecessors have been selling its lubricating oils to large railroad companies, who doubtless bought the oil because it was produced by the complainant and its predecessors, who had achieved a reputation for producing a high character of oil under the name and brand of 'Galena Oil,' and not under any trade-mark. This fact I think sufficiently appears from the pamphlet introduced in evidence concerning complainant's 'Galena Oils,' where no reference is made to any trade-mark under which complainant's product is sold."

It will thus be seen that in the opinion of Judge Morrow a **star** per se is not a technical trade-mark, or a mark in which one **may** acquire trade-mark rights. This, however has been adjudicated, so far as the mark of the complainant is concerned, in the decisions cited in the affidavit of George S. Brown, namely, Hutchinson et al. v. Covert, 51 Fed. Rep., 832, and Morrison et al. v. Case et al., 9 Blatchf., 549 Federal Cases 9845, in which several Federal courts have held that the star employed by complainant is a technical trade-mark, and that they have trade-mark rights therein, so that the decision in the

Galena Oil case, *supra,* does not have any bearing on the present controversy except to indicate the measure of differences which should exist between marks, so that one is not an infringement on the other.

It will be seen that in the Galena case the employment of one star with a big "G" enclosed therein was not infringed by the employment of a star associated with the words "Extra Star." The case at issue presents marks much more dissimilar than the marks considered in the Galena Oil Case, in that one of the marks registered is an "open work" star, accompanied by the word "Star," while the other mark is clearly a comet, and also accompanied by the word "Comet," the head of the comet being entirely dissimilar from the star in the other mark.

Granting, as decided by the several courts above quoted, that the star of complainant is a valid trade-mark, it is contended in the light of the Galena Oil case that any other star differing from it in shape, make up, or accompanying words, would not infringe the open work star of complainant, and much less is there an infringement of such star by a comet, the major portion of which is a tail, and also accompanied by the word "Comet."

In the several cases above cited wherein the complainant was a party complainant, the controversy was in relation to marks very dissimilar from the mark of defendant. In Morrison et al. v. Case, *supra,* the Court said: By use, the word "star" has become a good trade-mark, and defendant use **"the words and device of complainant both in the exact form and in such near resemblance as is calculated to deceive."**

In Hutchinson et al. v. Blumberg the defendant employed a star and crescent, with the star the more noticeable because, as the Court says "he makes the star so

prominent a feature in the mark as to enable him or those dealing in his goods to impose them upon the inexperienced and unwary as "Star Goods."

In Hutchinson v. Covert the defendant employed a single star with the words "Lone Star," and the Court held that such was an infringement.

In the case under consideration defendant does not employ a star, although the head of the comet, if taken alone and not in connection with the tail and word, would, of course, be considered a star. The head and tail of defendant **comet** are one single figure, and even without the word "comet" could not for a moment be considered a **star,** and when accompanied by the word "comet" all similarity is eliminated and the mark is surely relieved from any possibility of infringement on the **star** of Hutchinson, Pierce & Co., especially in view of the fact that **no evidence has been introduced to show, or attempt to show, any confusion.**

The plaintiff has argued in this case, as it also argued in the cancellation proceeding before the Commissioner of Patents herein mentioned, that defendant might without infringement use a conventional comet as a trademark which would not embody a star, but would represent a nebulous head or, as applied to drawings, a head of stipple work, stating that the mark as employed by defendant does not in fact represent a comet. It is not seen that it is necessary to dispute the position taken by complainant that the mark of defendant does not accurately represent a comet. It may be true as stated in the argument that a comet is in fact a nebulous body with a tail, but as far as correct representation of astronomical bodies is concerned it is believed that the mark of defendant represents a comet as faithfully as the mark of complainant represents a star.

It is not believed that the accuracy of representing heavenly bodies by the marks of the parties is one of any importance in this case as so far as trade-mark rights are concerned the defendant might have used the donkey or the scepter hereinbefore shown and called either one a comet; and been fully within his rights, as fully as the complainant is within its rights by using the representation it employs and calling it a star. Whether the marks are or are not correct representation of any heavenly or other bodies does not seem to be the point at issue; the point seems to be whether or not the mark of defendant so nearly resembles complainant's mark that the Court may take judicial knowledge of the fact that it is likely to cause confusion without any testimony being introduced to show actual confusion to have existed.

Since the beginning of the present action, a proceeding was begun in the United States Patent Office by this complainant for cancellation of the trade-mark No. 56,-102, registered by defendant, and the grounds alleged for such cancellation were in all respects similar, and the testimony introduced in support of such petition substantially the same as the facts and testimony relied upon in the present proceeding.

The matter was ably presented before the Examiner of Interferences and a printed brief filed, in which the present complainant cited the following authorities in support of their contention with numerous citations from many of them:

Bass & Co. v. Feigenspan, 96 Fed. Rep., 206, 212.
Enoch Morgan's Sons Co. v. Ward, 152 Fed. Rep., 692.
Johnson & Johnson v. Bauer & Black, 82 Fed., 662.

Fairbanks Co. v. Luckel, etc. Co., 102 Fed., 331.
Menendez v. Holt, 128 U. S., 514.
N. K. Fairbank Co. v. Central Land Co., 64 Fed., 134.
Royal Baking Powder Co. v. Raymond, 85 Fed., 231.
Enoch Morgan's Sons Co. v. Wendover, 43 Ib., 420.
Gannett v. Rupert, 127 Fed., 963.
Shaver v. Heller & Merz Co., 108 Fed., 821.
Thompson v. Montgomery, 41 Ch. D., 35; 138 U. S., 550.
Anheuser-Bush Brewing Asso. v. Piza, 24 Fed., 149.
Colgate v. Adams, 88 Fed., 899.
Clark Thread Co. v. Armitage, 74 Fed., 936.
City of Carlsbad v. Kutnow, 71 Fed., 168.
Fuller v. Huff, 104 Fed., 141.
Lawrence Mfg. Co. v. Tenn. Mfg. Co., 138 U. S., 537-548.
Columbia Mill Co. v. June Mfg. Co., 163 U. S., 169, 193.
Brown Chemical Co. v. Meyer, 139 U. S., 540.
Saxlehner v. Eisner & Mendelsohn, 179 U. S., 19.
Columbia Mill Co. v. Alcorn, 150 U. S., 460, 464.
Gannett v. Rupert, 127 Fed., p. 964.
Lawrence Mfg. v. Tenn. Mfg. Co., 138 U. S., 537-548.
McLean v. Fleming, 96 U. S., 245; Menendez v. Holt, 128 U. S., 514.
Faulder & Co. v. Rushton, Ltd., 20 R. P. C., 477, 495.

After full and due consideration by the Examiner of Interferences of the cancellation proceeding a decision was rendered, dated October 21, 1907, as follows:

> This is an application by Hutchinson, Pierce & Company to cancel the certificate of registra-

tion of Joseph Loewy, dated August 21, 1906, No. 56,102.

The first ground for cancellation alleges that "Loewy was not entitled to the use of the mark at the date of his application for registration thereof." The two remaining grounds set forth facts upon which the conclusion, constituting the first ground, is based.

The testimony of Brown and McKiernan establishes that the registered mark of applicant (Exhibit No. 5) has been continuously used on shirts sold by this company from at least as early as 1869.

The mark shown in Exhibit No. 5 consists of the representation of a six pointed star and the word "Star" placed therebelow. It appears that the goods made by the applicant's company are known in the trade as "Star" goods.

The testimony of Loewy (Qs. 3-7) is believed to be sufficient to establish that the mrak shown in his certificate of registration, No. 56,102, has been continuously used on shirts sold by his company since 1872. As this date is subsequent to 1869, the date established by applicant for adoption and use of its mark, and as the class of goods to which they have been affixed is the same, if the mark of registrant so nearly resembles the mark of applicant as to be likely to cause confusion or mistake in the mind of the public or to deceive purchasers, the registrant was not entitled to the use of the mark in question at the date of his application for registration, and his certificate of registration should be canceled.

In the certificate No. 56,102 are shown a five-pointed star and a tail or streamer joined thereto to represent a comet, and the word "Comet" written in script thereunder. It is difficult to conceive that goods bearing this mark would be known in the trade by any name other than "Comet." Moreover, **the failure of applicant to take any**

testimony for the purpose of showing that these goods were known or sold by the name "Star," justifies the belief that they are known as "Comet" goods.

The only feature which is common to the two marks is that of the star, and this is so combined in the registrant's mark with other matter that the two marks would not be likely to be mistaken one for the other.

This case is clearly distinguished from that of Hutchinson, Pierce and Company v. Jacob J. Blumberg, 51 F. R., 829, in which it appears that the defendant not only made the representation of a star a prominent and independent feature of his mark, but also used the word "Star" in connection therewith in such a way that purchasers were deceived into buying the goods of defendant for those of complainant. It must be held that the marks of applicant and registrant, each taken as a whole, are so unlike in appearance as not to be likely to cause confusion or mistake in the mind of the public or deceive purchasers.

Applicant contends, however (brief, pages 2-6), that registrant has no right to use the representation of a star, even when combined with other features; that the use of any other features therewith cannot give registrant the right to use the representation of a star regardless of whether the two marks, each considered as a whole, are so unlike in appearance as to cause confusion in the mind of the public, and that the use of these additional features, by analogy to patent law, resembles the limitations of a claim of a patent and cannot avoid infringement. Applicant has cited numerous cases to support this contention only two of which need be considered here in detail. In the case of Bass & Company v. Feigenspan, 96 F. R., 206, which did not involve unfair competition, the court held that neither the monogram of defendant, the gold border nor scroll tracing *formed a part of the*

mark, but were mere accessories; that the essential and prominent feature was the triangle, and this conclusion was reached by comparing the marks of the complainant and defendant as a whole. In the case of Enoch Morgan's Sons & Company v. Ward, 152 F. R., 692, the remarks of the court, cited by applicant on pages 4 and 5 of its brief, were made with reference to the *dress* of the competing article such as the color of the wrapper and *not* to features constituting part of the mark. Following these remarks, the court then directly compares the marks of the complainant and defendant, each being considered as a whole, for the purpose of ascertaining the question of infringement. Nothing is found in either of these cases or in the other cases cited by applicant to sustain its contention that a property right may be had in an element of design used for trade-mark purposes which may be enforced against any users of the element no matter how different the design may be in which they employ the element, and that contention is regarded as unreasonable.

On the other hand, the U. S. Supreme Court in the case of Liggett & Myers Tobacco Company v. Rudolph Finzer, 128 U. S., 182, brief of registrant, page 8), held that the representation of a star with the word "Light" therebelow thus forming the word "Starlight" did not infringe the representation of a star.

It is therefore adjudged that registrant, Joseph Loewy, was entitled to the use of the mark shown in the certificate of registration No. 56,102, at the date of his application therefor and the application for cancellation is dismissed."

This case went before the Commissioner of Patents on appeal on a state of facts substantially similar in all respects to the facts in the present suit. That was a pro-

ceeding for cancellation of the registration of Loewy, but the testimony taken and the briefs submitted for both parties were similar and might almost be said to be identical, as they were certainly identical in subject-matter and substance. Upon the appeal the decision of the Examiner of Interferences was affirmed by the Assistant Commissioner employing the following language:

Opinion of Commissioner of Patents.

Appellant's mark was registered April 3, 1906, No. 51,146. It consists of the representation of a star and the words "STAR," and is applied to shirts, shirtwaists, and blouses. Appellee's mark is described as consisting of a representation of a comet and the words "THE COMET." This representation as it appears in the drawing forming part of the registration is not of the usual character. A comet is ordinarily represented as having a nebulous head, whereas in appellee's drawing the head of the comet consists of a star, which is given great prominence with respect to the other features of the mark.

Appellant seeks the cancellation of appellee's mark, alleging that the representation of a star and the word "STAR" are the exclusive property of appellant; that appellee's use of the representation of a star is an unwarranted invasion of appellant's property rights therein, and that appellee has no right to use this symbol either alone or in combination with other devices.

It appears from the record that appellant was the first to adopt and use its mark, and if it is found that the marks of appellant and appellee are identical, it would follow that appellee had no right to use his mark at the time the application for registration was filed.

I agree with the conclusion of the Examiner of Interferences that the marks are not identical, and that there is no such near resemblance between them as to be likely to cause confusion in trade. Appellant's mark consists, as above stated, of the representation of a star and the word "STAR," while appellee's mark has in addition to the representation of a star a streamer representing, it is said, the tail of a comet, and the words "THE COMET" printed in large type. These marks give an entirely different impression to the eye, and there seems to be no likelihood that appellee's goods would be referred to as "star goods" instead of "comet goods." There seems to be no likelihood of confusion either in the appearance of the marks or in the sound of the words by which the goods of the respective parties would probably be referred to.

Appellant makes the contention, however, that as it has the exclusive right to the use of the mark, consisting of the representation of a star and the word "STAR," no other person, firm or corporation has the right to use the representation of a star alone or with accessories, no matter what the character of such accessories may be. A number of authorities are cited in support of this contention. These authorities have been examined in connection with appellant's argument, but it is believed that they do not sustain this contention. As I understand the decisions on this subject, they go no further than to hold that an infringement of a technical mark can not be avoided by the use of accessories which do not form part of the mark, and which do not in fact change the substantial identity of the mark. One of the principal decisions relied upon by appellant is the case of Bass & Company v. Feigenspan, 96 Fed. Rep., 206, 212, from

which appellant gives copious extracts. In this decision the court said:

> "No one who has counterfeited a legitimate trade-mark and applied the spurious symbol in competition with the genuine can avoid the charge of infringement by showing that the false mark has in practice been so accompanied on labels, capsules, or other accessories, not forming part of it, as to render it unlikely that the public has been deceived. * * * A sound public policy requires that the spurious trade-mark be suppressed, whether it is or is not for the time being accompanied by such accessories, not constituting part of it, as to avoid deception or render it unlikely."

The court carefully points out in this decision that the accessories used by the infringer **did not constitute a part of the mark.** In the present case the features of appellee's mark referred to by the appellant as accessories form an actual part of the trade-mark, and in my opinion are so combined with the representation of the star which forms the head of the comet in appellee's mark as to be clearly distinguishable in appearance from that of the appellant. Furthermore, there would seem to be no phonetic confusion between the trade-marks, when the words defining the same are spoken, for the appellee's goods would probably be known as "THE COMET" goods, and the appellant's goods would be known by no other name than the "STAR."

The decision of the Examiner of Interferences is affirmed.

The decision of the Commissioner of Patents is not inserted here as being authority or binding upon the court

in any particular, but is the opinion of a tribunal which by reason of handling very large numbers of similar cases is unusually familiar herewith, and by reason of the provision of the statute that appeals may be taken from the Commissioner of Patents to the Court of Appeals of the District of Columbia, occupies a position similar to the opinion of the trial court from which this appeal came, and is simply cited to strengthen the weight of that opinion.

In conclusion the attention of the Honorable Court is invited to the next following pages upon which are exhibited the registered trade-marks of both the complainant and the defendant and the label employed by defendant upon boxes with the request that the court carefully compare such with the exhibits introduced by the complainant. From the cloth specimens forming a part of this brief it will be readily seen that defendant employs both a red and a black label to mark his goods, whereas the complainant employs only the red label. In the matter of marking the boxes complainant employs a neutral color, whereas defendant imprints his trade-mark, "The Comet" in noticeable red upon the label. The **star** of defendant's label is in size sufficient to cover substantially the whole width of the label, while defendant's **comet** is but small and occupies a position at the extreme end of the label as distinguished from complainant's **star,** which is placed in the middle of the label. All of these points above mentioned are such as to distinguish the make of one party from that of the other so as to prevent confusion and, while it is, perhaps, true that the Court will not look for differences, but for similarities between marks, it is believed in the present case the differences far outnumber the similarities and greatly pre-

dominate in matters of importance so that many more differences than similarities will be found by the court if looked for.

It is not, of course, contended that the decisions of the several tribunals of the Patent Office are decisions of a court, even inferior in its jurisdiction to the present court, but as such tribunals are almost daily called upon to pass upon the question of similarity of trade-marks as presented in interference, opposition and cancellation proceedings, it is contended that they have become expert upon such lines and that a decision from the Patent Office is of greater weight than a decision from a court of jurisdiction which would be considered concurrent in scope, if such might exist, the decision, however, being more in the nature of expert testimony than an adjudication which could be properly considered by the present trial court.

One other point should also be considered by this Honorable Court before deciding the question of whether or not the mark of defendant infringes, and that is the question of laches.

It is shown in the testimony of the complainant herein that the mark of defendant has been used since 1867 by the defendant and his immediate predecessors in business, and that the goods bearing such mark have been sold in great quantities in a large number of States, and especially in the States in which the complainant has its offices and manufacture their goods, namely, New York and Connecticut.

Mr. Brown in his testimony testified that so far as his knowledge went, complainant did not have notice or any knowledge of the use by defendant of the mark until October, 1903, but **there is no evidence whatever that officers of the corporation prior to that time did**

not actually have full knowledge of the use of the mark by defendant, the said Brown having assumed the duties of President in January, 1905, and admitting that the matter in 1903 came to the attention and was managed by the then president, Mr. Pierce. It is not at all probable that shirts in such large quantities could be sold in the States as testified to by Mr. Loewy on **behalf of the complainant,** without coming to the attention of other shirt manufacturers doing business in the same States.

In Sir Peter Coats et al. v. Merrick Thread Co. et al., 149 U. S., 562, Law Ed., 852, this court says:

> "This intent to imitate plaintiff's spool heads, if any such intent existed, is manifest rather in the label than in the periphery, but plaintiffs having submitted to this without prejudice for twelve years, have waived their rights to relief upon this ground."

Quoting McLaughlin v. People's R. Co., 21 Fed. Rep., 574; Ladd v. Cameron, 25 Fed. Rep., 37; 3 Robinson, Sec. 1149, the former of which citations is for a patent, the court saying:

> "Now, generally speaking, the laches of complainant is sufficient ground for non-interference on the part of a court of equity. Nearly all of the lifetime (13 years) of this patent the complainant has remained silent, by his silence consenting to, or at least acquiescing in the acts of the defendant. To interfere now by injunction would seem inequitable."

As in the patent, so in the trade-mark. The silence of complainant for thirty-eight years should clearly estop them at this time from raising the question of the validity of property rights of the defendant in the trade-mark.

In Robinson on Patents, Section 1194, the author lays down this general rule:

> "Another reason is found in the plaintiff's acquiescence in the infringement, or his laches in the enforcement of his rights. The unwilling submission of the plaintiff to injuries which he could not resist does not prejudice him in a court of equity. But an intelligent and voluntary consent, even though manifested only by inaction, for any considerable period, if unexplained, is a fault that may deprive him of a remedy which otherwise he would have obtained. * * * A similar result follows from the unreasonable delay of the plaintiff in instituting actions, though he has never intentionally submitted to an infringement."

The above quotation, cited by this court in Coates v. Merrick, has the weight of a decision of the court, and, though applied by Robinson to patents, having been quoted by this court with approval in a trade-mark case, as equally applicable thereto, is particularly applicable to the case at issue.

It is thought necessary to call the attention of this Honorable Court to several obvious attempts in the brief of appellant to purposely mislead the court as to the facts. For instance on page 7 of the brief there appears a mark which is a portion of an alleged advertisement said to have appeared in the Haberdasher of October, 1903, and reproduced on page 64 of the transcript. As the mark stands on page 7 the representation of the comet is disassociated from the word "Comet" and is emphasized and exaggerated to a very considerable extent. Instead of considering the mark as appearing upon page 7 the court is respectfully requested to confine its consideration

to the full exhibits as introduced and as appears on page 64.

Even this exhibit is not believed to be proper subject matter for consideration. If it has any bearing in the case at all it has a bearing upon the question of unfair competition in trade and not a question of infringement of trade-marks as it relates wholly to an advertisement and not to the mark as used upon the goods. It is believed that the position assumed by the Court of Appeals is unassailable that by reason of lack of diversity of citizenship questions could be considered as between the parties resident of the same state, except such as are given expressly in the jurisdiction of the court by the statutes. The statutes have never given the Federal court jurisdiction over questions of unfair competition in trade between residents of the same State and consequently all questions of unfair competition must be eliminated in the present case, and the advertisement which appears upon page 64 of the transcript relates to this branch of the case.

Upon page 8 of the brief, near the top, occurs this paragraph:

> "The * * * complainant succeeded in finding one of respondent's shirts in Connecticut and instituted this suit (page 8). The mark on this shirt is reproduced on page 63 of the record."

This sentence just quoted is absolutely false in every sense of the word and is further intended to be misleading to the court first, for the reason that the suit was begun on the *14th day of May*, 1906, and the shirt mentioned above was not purchased until *June* 28, 1906, *six weeks after the suit was begun* as appears on page 18, Q. 26 of the transcript.

Furthermore, the paragraph just quoted is absoutely false in assuming that the shirt under discussion was one of respondent's manufacture. There is not one word of evidence introduced which properly connects the respondent with the manufacture of the exhibit. Appellant had every opportunity which is granted by law and the rules to put on the stand the dealer from whom this shirt was purchased to testify where he purchased this shirt, but they refused to do so and relied wholly on their witness Loewy to identify the shirt as of respondent's manufacture. This the witness refused to do and only grudgingly admitted that the mark appearing upon the shirt was similar to respondent's mark but never under any circumstances testified that the mark was the same as respondent's mark or that the shirt was of respondent's manufacture.

On the same page of respondent's brief near the bottom appears this statement:

> "Two of his (respondent's) witnesses say that the mark formerly used by respondent was a comet with a point formed by nebulous matter and not by a star or pointed figure (p. 76 and p. 78). The statement of the third witness, the respondent, to the contrary, in view of the evasive character of his testimony is not, we think, persuasive."

In this respect it is pointed out that *the respondent did not take the stand in his own behalf* and appeared only as a witness for the appellant. The appellant chose to assume the risk of putting the respondent on the stand in appellant's behalf and must abide by the consequences and the testimony thus produced. The testimony taken on behalf of the appellant itself is that the respondent has

used a mark *similar* to that shown on page 63 of the transcript for many, many years.

Under the heading, "The Law," on pages 10 and 11 of appellant's brief, is a quotation from section 16 of the trade-mark act to the effect that registration of marks is prima facie evidence of ownership. This section applies as well to the mark of respondent as to that of appellant as both marks are registered. Both having been registered prior to the beginning of this action the prima facie right of appellant is totally negatived by a similar prima facie right on behalf of respondent.

As stated at the beginning of this brief it is still contended that this court has no jurisdiction of appeal under the trade-mark statute from the Court of Appeals as while the statute does not in so many words enact that the Court of Appeals is final it did enact that the appellate jurisdiction of the Court of Appeals is similar to that in patent cases which had been held to be final. However the court may look at the matter, whether that they have no jurisdiction, or whether they may consider the merits of the appeal is thought to be immaterial as far as respondent's rights are concerned as it is believed the law and the facts are wholly with the respondent, and that even considered upon the merits the appeal should be dismissed for want of such merit.

Respectfully submitted,

E. T. FENWICK,

L. L. MORRILL,

Solicitors for Respondent and of Counsel.

DARK PAGE E

TRADE-MARK.

No. 51,146. REGISTERED APR. 3, 1906.

HUTCHINSON, PIERCE & CO.

SHIRTS, SHIRT WAISTS, AND BLOUSES.

APPLICATION FILED APR. 28, 1905.

STAR

TRADE-MARK.

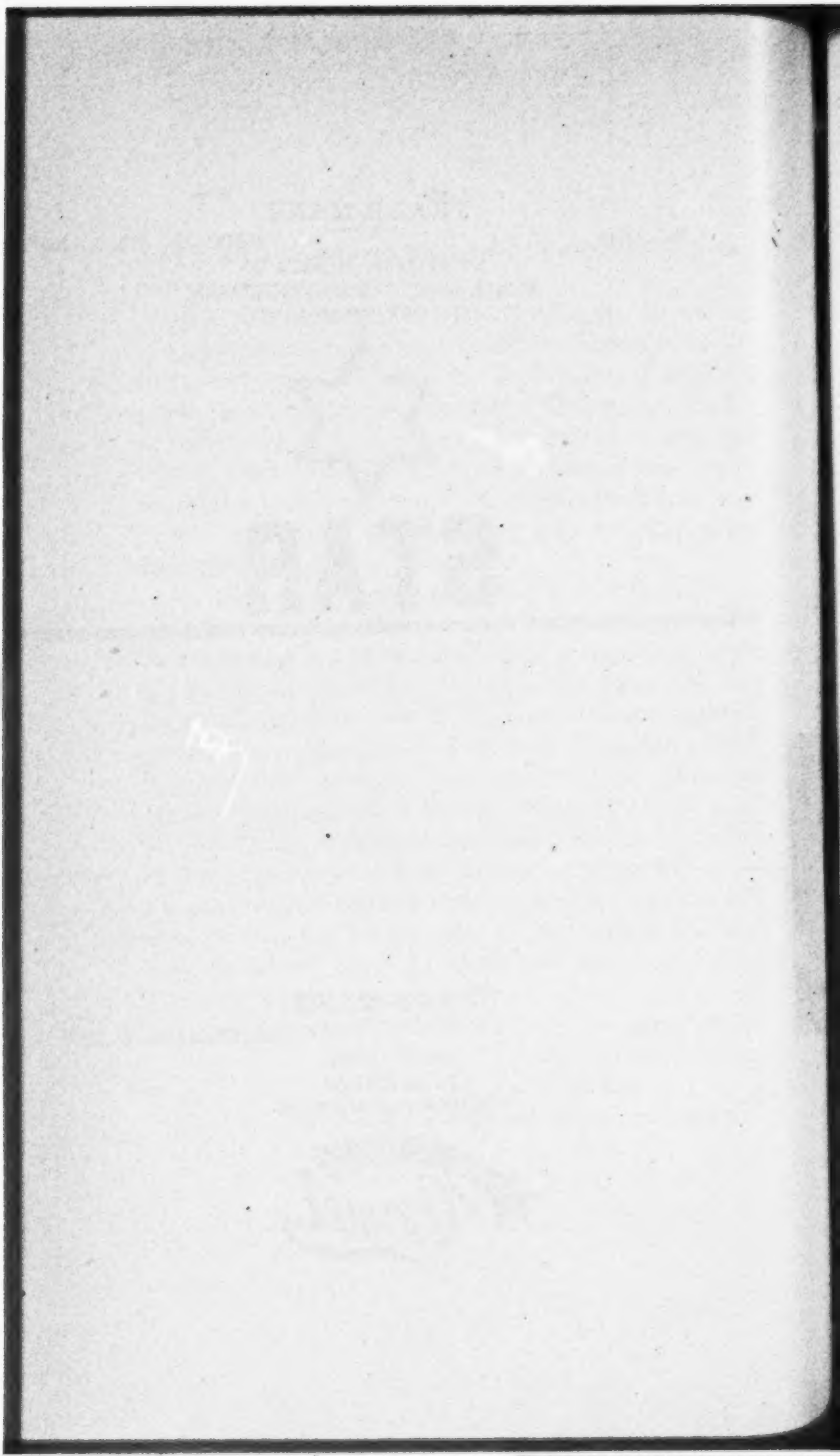
No. 56,102. REGISTERED AUG. 21, 1906.

JOSEPH LOEWY.

DRESS SHIRTS.

APPLICATION FILED MAR. 29, 1906.

LEED THRU



DARK PAGE BLEED

THE COMET
TRADE MARK
THE Comet SHIRT
LOT.
DOZ.
SIZE.

HUTCHINSON, PIERCE & CO. *v.* LOEWY.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 182. Argued April 29, 1910.—Decided May 16, 1910.

In a suit in the Circuit Court under the Trade-mark Act where diverse citizenship does not exist the court's jurisdiction extends only to the use of the registered trade-mark in commerce between the States with foreign nations and the Indian Tribes.

Under §§ 17, 18, of the Trade-mark Act of February 20, 1905, c. 592, 33 Stat. 724, and § 6 of the Circuit Court of Appeals Act of March 3, 1891, c. 517, 26 Stat. 826, a final decision of the Circuit Court of Appeals in a case brought under the Trade-mark Act can only be reviewed by this court upon certiorari. *Atkins* v. *Moore*, 212 U. S. 284.

Appeal from 163 Fed. Rep. 42, dismissed.

THE facts, which involve the jurisdiction of this court of an appeal from the Circuit Court of Appeals in a suit brought under the Trade-mark Act of 1905, are stated in the opinion.

Mr. Archibald Cox for appellant:

On the question of jurisdiction of the appeal by this court:

This is the first appeal based on the fact that the jurisdiction of the Circuit Court was founded on the Trade-mark Act of February 20, 1905.

Appellant's right to this appeal depends upon that act and the Judiciary Act of March 3, 1891, which latter act provides for the distribution of the entire appellate jurisdiction of our national judicial system. *McLish* v. *Roff*, 141 U. S. 661; *Macfadden* v. *United States*, 213 U. S. 288. An appeal lies from the Court of Appeals to this court in all cases except those wherein an appeal lies to this court direct from the court of first instance and those wherein the decision of the Court of Appeals is expressly made final. That right of appeal is not

to be defeated by implication, but exists unless the decision of the Court of Appeals is "made final in terms" see *Press Publishing Co.* v. *Monroe*, 164 U. S. 105; *Werner* v. *Searle Hereth Co.*, 144 U. S. 47.

The Judiciary Act of March 3, 1891, applies equally to laws of the United States enacted before and after that date, *Spreckles Sugar Refining Co.* v. *McClain*, 192 U. S. 397; *Lau Ow Bew* v. *United States*, 144 U. S. 56, and under the Judiciary Act the Court of Appeals had appellate jurisdiction in the case at bar and an appeal could be taken to this court, because the jurisdiction of the Circuit Court rested on a law of the United States and the case was accordingly not a case in which the judgment of the Court of Appeals is made final in terms, but a case not expressly made final by the section.

The Trade-mark Act of 1905 is in no way inconsistent with the Judiciary Act of 1891 and does not make the decision of the Court of Appeals final. The provision as to the jurisdiction of courts in the Trade-mark Act was enacted following the Judiciary Act which contained words "manifestly inserted out of abundant caution in order that any qualification of the jurisdiction by contemporaneous or subsequent acts should not be construed as taking it away, except when expressly so provided. Implied repeals were intended to be thereby guarded against. *Lau Ow Bew* v. *United States, supra.*

With this before it Congress carefully avoided making the decision of the Court of Appeals final in trade-mark cases, as will be seen by comparing the words of the Judiciary Act and the Trade-mark Act.

There is nothing inconsistent. There is nothing making the decision of the Circuit Court of Appeals final. And it would seem that Congress took pains to leave the right of appeal to this court untouched.

The Trade-mark Act of 1905 also provides in § 18, that writs of certiorari may be granted by this court. This is not inconsistent with the right of appeal and is not unnecessary. The right of appeal to this court is limited by the Judiciary

Act to causes in which the amount involved exceeds one thousand dollars. The provision for certiorari in cases under the Trade-mark Act applies regardless of the amount of the controversy.

Mr. E. T. Fenwick and *Mr. L. L. Morrill* for appellee.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

This was a bill in equity for an injunction and accounting, the complainant alleging the defendant had infringed its technical trade-mark applied to shirts, and also was guilty of unfair competition. As complainant is a corporation of the State of New York and defendant is a citizen of the same State, the court's jurisdiction extends only to the use of the registered trade-mark in commerce between the States, with foreign nations and the Indian tribes.

There was no attempt to prove that defendant had passed off, or intended to pass off, his goods for complainant's, or had made profits, or that complainant had sustained damage. The cause proceeded solely on complainant's ownership of its technical trade-mark.

The Circuit Court held that defendant's trade-mark or brand was clearly distinguishable from that of complainant, and said:

"There is no reasonable probability of the ordinary purchaser being deceived into buying the defendant's manufacture as that of complainant. The rule is well established that a trade-mark, word or symbol has the elements of a property right and may not be unlawfully used by a rival in business either alone or as an accessory to such prior appropriation and in such cases a right to injunctive relief follows without proof of confusion of proprietorship or that buyers have been actually misled by such use. But if a defendant's design or symbol is essentially different and distinguishable in appearance so

that by no possibility can his article be taken for complainant's genuine production, a cause of unlawful appropriation is not maintainable." 163 Fed. Rep. 44.

The bill was thereupon dismissed, and having been taken by appeal to the United States Circuit Court of Appeals for the Second Circuit, the decree below was affirmed. 163 Fed. Rep. 42.

Appellants thereupon petitioned for an appeal to this court, which was allowed.

Sections 17 and 18 of the act of Congress approved February 20, 1905, c. 592, 33 Stat. 724, in respect to trade-marks, reads as follows:

"SEC. 17. That the Circuit and Territorial Courts of the United States and the Supreme Court of the District of Columbia shall have original jurisdiction, and the Circuit Courts of Appeal of the United States and the Court of Appeals of the District of Columbia shall have appellate jurisdiction of all suits at law or in equity respecting trade-marks registered in accordance with the provisions of this act, arising under the present act, without regard to the amount in controversy.

"SEC. 18. That writs of certiorari may be granted by the Supreme Court of the United States for the review of cases arising under this act in the same manner as provided for patent cases by the act creating the Circuit Court of Appeals."

We are of opinion that this appeal will not lie, and that the remedy by certiorari is exclusive. By the sixth section of the Judiciary Act of March 3, 1891, c. 517, 26 Stat. 826, 828, the final decisions of the Circuit Courts of Appeal are made final "in all cases under the patent laws, under the revenue laws, under the criminal laws and in admiralty cases," with power in this court to require any such cases to be certified thereto for its review and determination, "with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."

We think that the language of § 18 places suits brought under the Trade-mark Act plainly within the scope of the act

establishing the Court of Appeals, and that a final decision of that court can be reviewed in this court only upon certiorari, and that therefore the pending appeal must be dismissed. And this conclusion is sustained by *Atkins* v. *Moore*, 212 U. S. 285, 291.

Appeal dismissed.